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No. ——

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

CITY OF CLEARWATER, FLORIDA, *et al.*,
*Petitioners,*
v.
CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,
*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, under 42 U.S.C. § 1988, which allows a "prevailing party" to receive an award of attorneys fees in civil rights litigation, a plaintiff can receive fees if it is not better off, or even is worse off, as the result of its suit.

2. Congress enacted 42 U.S.C. § 1988 to provide access to courts for impecunious persons who were injured by civil rights violations but lacked the money to pay lawyers and were therefore unable to vindicate their rights. Congress did not enact Section 1988 to provide fees for wealthy corporations and organizations that are now suing under civil rights laws and are seeking attorneys fees under Section 1988. Due to their economic resources those organizations do not need fee awards to have access to courts, and regularly bring and defend numerous kinds of suits and litigate to the hilt, regardless of the prospect of fee awards.

In these circumstances, the second question presented is: Whether a wealthy organization can be denied attorneys fees under 42 U.S.C. § 1988 because it possesses extensive resources, needs no fee award in order to have access to courts, regularly brings and defends lawsuits and litigates to the hilt regardless of fee awards, and/or uses extensive resources to facilitate litigation *a outrance*, or unethical litigation conduct, against less wealthy opponents.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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The City of Clearwater et al. hereby petitions for writ of certiorari to review the judgment of the Eleventh Circuit in this case.[1]

### OPINIONS BELOW

The opinion of the district court (App. 9a) is reported at 773 F. Supp. 321 (M.D. Fla. 1991). The opinion of the Court of Appeals (App. 1a) is reported at 2 F.3d 1509 (11th Cir. 1993). The Court of Appeals' order denying reconsideration is reproduced at App. 38a.

### JURISDICTION

The Court of Appeals rendered judgment on September 30, 1993. A petition for rehearing was denied on

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[1] The parties to this action are the petitioners, the City of Clearwater, Thomas Bustin and Lucille Williams, and the Respondent, the Church of Scientology Flag Service Organization, Inc.

December 14, 1993. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254.

## STATUTORY PROVISION INVOLVED

42 U.S.C. § 1988 provides that, in civil rights cases, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee. . . ."

## INTRODUCTION

In this case Scientology sought an award of fees under 42 U.S.C. § 1988, on the ground that a suit had caused amendments to an ordinance. The district court, which supervised and became intimately familiar with the litigation over the course of several years, ruled that an award of fees was not proper under this Court's decisions interpreting Section 1988. The district court explicitly recognized that Scientology itself had argued that "in dispositive respects the new ordinance was the same or even worse than the old one," did not "truly remove[e] the constitutional infirmities" of the original ordinance, was "far more pernicious" to Scientology than the original law, and required Scientology to raise claims "identical to those raised in its" attack on the first ordinance. App. 23a; *Church of Scientology Flag Service Org. v. City of Clearwater, et al.*, 773 F.Supp. 321, 329 (M.D. Fla. 1991). Recognizing these points, the district court said that, "When, as in this case, Plaintiff remains in essentially the same position, or perhaps in a worse position after a lawsuit, the Court cannot find that Plaintiff prevails." App. 34a; *Id.* at 334.

The Eleventh Circuit overturned the district court's decision. The Circuit ruled, remarkably, that even amendments *adverse* to Scientology gave rise to a fee award. *Church of Scientology Flag Service Org. v. City of Clearwater, et al.*, 2 F.3d 1509, 1513 (11th Cir. 1993). It also held that an award should be granted though it conceded that "the bulk of the recordkeeping and regulatory

provisions [which Scientology assailed in the initial ordinance] remained intact," i.e., the provisions encompassing the basic purposes of the law were not touched by the amendments.

The Circuit's opinion is inconsistent with decisions of this Court holding that a fee award requires a plaintiff to have obtained benefit—to have changed materially the legal relationship of the parties. *Texas State Teachers v. Garland Indep. School Dist.*, 489 U.S. 782 (1989); *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Circuit's decision also will discourage amendment of laws in order to accommodate parties, and will thereby cause an increase in litigation. It will reward wealthy organizations which are now filing suits under the Civil Rights Laws and which possess the resources to litigate *a outrance* and thereby force at least *some* peripheral changes in ordinances, even if defeated on all main points.

Additionally, the Circuit's decision, like those of other courts that feel constrained by precedent until this Court speaks correctively, is inconsistent with the Congressional intent underlying Section 1988. Congress intended § 1988 to aid the impecunious oppressed who otherwise lacked access to the courthouse, *not* the wealthy who can and do devote enormous resources to litigation regardless of the availability of fee awards. But the Circuit's decision assists the wealthy who were *not* the object of Congress' solicitude.

For all these reasons, a corrective decision by this Court is required.

## STATEMENT

A. As explained in a companion petition for certiorari, in the early 1980s Clearwater held extensive legislative hearings to determine whether, and if so the extent to which, Scientology had in fact committed crimes and bad acts, and to determine if a law had to be enacted to protect the City's citizens. Because Scientology is a

secretive organization about which little was known, Clearwater employed knowledgeable special counsel to *help conduct the legislative hearings*, as also explained in the companion petition.

One of the many bad acts that surfaced in the legislative hearings is the use of expensive, harassing litigation to suppress public revelation of misdeeds lest such revelation play hob with Scientology's recruitment efforts. In this connection, as stated in a legislative report to Clearwater's City Commission, Scientology's founder, L. Ron Hubbard, *whose writings are its gospels*, "realized that many people cannot afford the burden of defending themselves in litigation. As his own financial resources grew, he was able to afford lawyers all over the world to do his bidding." App. 63a.

Hubbard decreed that lawsuits should be used to harass and destroy, as shown by his writings quoted in the legislative report. Hubbard wrote that " 'The purpose of a lawsuit is to harass and discourage rather than to win.' " He wrote that " 'The law can be used very easily to harass, and enough harassment on somebody who is simply on the thin edge anyway . . . will generally be sufficient to cause his professional decease. If possible, of course, ruin him utterly. . . .' " App. 63a. He wrote that, if a Scientologist is ever arrested for providing its "training" (called auditing), " 'within two or three hours after receipt of the warrant, have signed [sic] upon the server of that warrant a personal civil suit for $100,000.00 damages for having caused the arrest of a Man of God. . . . And if you are foolish enough to have an attorney who tells you not to sue, immediately dismiss him and get an attorney who will sue.' "

Hubbard's writings, as said, are Scientology's gospels. (Scientology, it recently became known, spent seven million dollars for nuclear blast resistant doors for a vault in which to store his papers.) Thus the legislative report warned Clearwater that:

> The City Commission should anticipate that the Church of Scientology will litigate *every aspect* of this Report, their deliberations, the decision and the subsequent enforcement of ordinances and legal proceedings. The Church of Scientology will seek to delay, obstruct, and interfere with every decision made by the City Commission. . . . The Church of Scientology will seek to exploit the judicial system to "harass and discourage rather than to win", in accordance with its written policy, and will cause the City to expend large sums of money in order to deal with the problems it has created. It will immediately sue the authors of this Report as well as City officials pursuant to the aforesaid policy.

In accordance with Hubbard's gospels concerning use of the law to overcome Scientology's opponents, Scientology has spent lavishly on lawyers. In the two year period 1987-88 alone, it spent over $30 million on them. And, though its attack on Clearwater's Ordinance has not gone beyond summary judgment, it appears to have already spent about $750,000 to one million dollars on lawyers fees to assail the Clearwater law. Clearwater has been unable to match Scientology's pretrial expenditures —the legislative report had been prescient in warning Clearwater that "Generally, the Scientologists have won cases only where they have so exhausted their victims' resources that the victims were unable to defend themselves." App. 64a.

B. As explained in the companion petition for certiorari, after the legislative hearings Clearwater enacted a registration and disclosure law similar or identical in wording to ones existing elsewhere by the hundreds or thousands, and widely applicable to a host of charitable groups including religious ones. The disclosure law was passed in order to protect Clearwater's citizens pursuant to the Brandeisian philosophy that sunlight is the best disinfectant. Several charitable groups quickly registered and disclosed the required information. But in accord-

ance with the gospels of its founder, and his recognition that public revelation would harm recruitment, Scientology did not comply with the law, but instead brought a lawsuit assailing it.

C. Scientology's suit was a wide ranging attack designed to decimate the ordinance. The breadth of the attack was illustrated by the district court's accurate description of Scientology's claims. The court said Scientology challenged the law because of allegedly bad motive, alleged unconstitutionality of requiring the maintenance and disclosure of information, alleged overbreadth and vagueness of the law, alleged entanglement with religion, alleged excessive discretion in the City Attorney, alleged violation of the right of privacy, alleged violation of the right of free speech, alleged discriminatory impact on Scientology and alleged illegality of prohibiting various acts. App. 33a; 773 F.Supp. at 333. A wider attack had perhaps not been seen since D-Day.

D. At a preliminary stage of the case, Clearwater, to accommodate points made by Scientology, amended certain provisions of the law. The amendments, as the district court recognized, were minor in the overall scheme of things, App. 27a-33a; *id.* at 331-334, because the law still required the extensive disclosures which are the purpose of antifraud registration and disclosure laws and which were the reason Scientology could not abide the law.

Among the amendments to the law, the following are pertinent here:

1. Initially the ordinance contained an exemption for organizations that solicit on their own premises from members, who were defined as persons "regularly attending or participating in a charitable organization." Because Scientology's members regularly attend and participate in activities on its premises, it could have qualified for this so-called "limited membership exemption" if, like some other groups that claim to be religious, it did not

solicit funds from the public in Clearwater, but instead confined solicitations to the thousands of Scientologists who come to Clearwater for "training" on Scientology's premises. Unlike most religious groups, however, but like *non*-religious charities, Scientology solicits from the public in Clearwater. Because it solicits from the public, it claimed the membership exemption discriminated against it as a putative religion, in favor of "mainline" religions.

Although Scientology's claim to religiosity is questionable, the City accommodated Scientology by eliminating the limited membership exception (just as the City accommodated other groups in other ways when doing so would not harm the law's ability to accomplish its purposes).

The elimination of the exemption did not aid Scientology, however, because it had to register and disclose information before the amendment (since it solicited from the public), and it had to register and disclose the same information *after* the amendment. If the amendment did anything to Scientology, it potentially "harmed" it because, after the amendment, Scientology could no longer avoid registration and disclosure by deciding to confine solicitations to the thousands of its members who come to its Clearwater premises for training, instead of soliciting the public.

2. Before amendment of the ordinance, the City Attorney could, in his or her discretion, begin an investigation upon receipt of ten complaints. After the amendment, if ten complaints *were* received, an investigation was mandatory, not discretionary. Before the amendment, Scientology complained that discretionary investigation would cause discriminatory law enforcement against it because of asserted unpopularity. After the amendment it claimed *mandatory* investigation would cause discriminatory law enforcement against it because only Scientology would be the subject of as many as ten complaints of fraud. Thus the amendment, in Scientology's own opinion, did it no good.

3. Before amendment, the City Attorney had to apply to a court for authority to issue subpoenas for documents. After the amendment, he or she could issue the subpoenas without first applying to a court. Obviously this did not assist Scientology.

4. Scientology has recently claimed that, after the amendments, certain provisions were no longer vague. It has not provided specifics, however, and, as described below, has continued to claim the ordinance is unconstitutionally vague.

E. The amendments were peripheral ones that did not alter the important thrust and particulars of the ordinance —they did not alter the requirement that charitable organizations must register and disclose specifically stated information to help prevent fraud. Because the required truthful disclosure would harm its recruitment efforts, Scientology could not abide by the amended ordinance any more than the initial one, and it needed to totally decimate the amended one as much as it had needed to decimate the initial one. It therefore filed a second lawsuit, this time against the amended ordinance, making all the same wide-ranging attacks (listed above) against the amended ordinance as it had made against the initial ordinance.

When Scientology subsequently sought an award of attorneys' fees on the ground that its first suit had caused the initial ordinance to be amended, the district court, which had several years experience with the litigation, expressly recognized that the amended ordinance did not improve Scientology's position "and did not materially alter the legal relationship between Scientology and Clearwater," but instead left Scientology in the same or in a worse position than initially. App. 34a; 773 F.Supp. at 334. The district court said that "when, as in this case, the Plaintiff remains in essentially the same position, or in a worse position after a lawsuit, the Court cannot find that Plaintiff prevails. *Id.* Because Scientology obtained

no material beneficial change in the parties' relationship, it did not even meet the necessary minimum of showing that it had been a prevailing party on "any significant issue in the litigation which achieves some of the benefit they sought in bringing suit." App. 23a; *id.* at 329.

There were numerous reasons for the district court's ruling that Scientology had not received any material benefit from the amendments. The district court found that Scientology had had to make the same broad-ranging attacks against the amended ordinance as against the initial one. App. 33a; *id.* at 333. The court also recognized that even Scientology itself had vigorously argued that the amended law was even *worse*, not better, than the initial one. The district court thus correctly pointed out that "In a Prehearing Memorandum, *Scientology argued, that in dispositive respects the new ordinance was the same as or even worse than the old one*: 'While the new ordinance differs in some respects from its predecessor, *what is significant are the ways in which the new ordinance is similar or identical to the very aspect of the old ordinance which caused this Court to rule it unconstitutional.*'" App. 23a; *id.* at 329 (emphasis added). The district court said correctly that in a mid-1980s appeal regarding the unamended ordinance, "In the Eleventh Circuit, Scientology told the Court that the amendments did not "truly remove[e] the constitutional infirmities" of the initial ordinance." *Id.* "And," said the district court, "in a July 21, 1987 brief to this Court urging that its first case not be dismissed, Scientology said the claims it raised in its second complaint are *'identical* to those raised in its first.'" *Id.* (emphasis added). (Scientology also said that under the amended ordinance the regulation of members is "far more pernicious" than under the initial, unamended one. *Id.*)

The district court also found that any changes in the legal relationship of the parties was "deminimus," App. 29a, 30a, 33a; *id.* at 331, 332, 333, that Scientology's claims of such a change was "unpersuasive," App. 29a;

*id.* at 331, and that Scientology's claim of having prevailed because of deletion of the membership exemption (a deletion either neutral or harmful to Scientology) was "not persuasive." App. 31a; *id.* at 332.

For all these reasons, the district court concluded that after the amendments Scientology "remains in essentially the same position or perhaps in a worse position," and that Scientology "did not meet the test for prevailing party status because its lawsuit . . . did not vindicate Scientology's rights; did not force Clearwater to cease its challenged behavior; and did not materially alter the legal relationship between Scientology and Clearwater. Therefore, Scientology's motion for attorneys' fees is denied." App. 34a; *id.* at 334. Scientology, the court made clear, had not met even the minimum necessity of prevailing on "any significant issue in the litigation *which achieves some of the benefit they sought in bringing suit.*" App. 24a; *id.* at 329 (emphasis added).

F. In its second lawsuit, against the amended ordinance, Scientology followed Hubbard's gospel requiring litigation *a outrance*. For example, Scientology argued that the Constitution precludes any discovery being required from an organization claiming to be a religion, and interposed no less than 2000 objections to discovery requests made by Clearwater.

This type of litigation against Clearwater was symptomatic of the litigation tactics generally used by Scientology in accordance with the gospels of Hubbard. Thus, in a January 20, 1993 decision upheld by the federal district court for the Central District of California, a special master, after having dismissed Scientology's case because of discovery abuse, awarded $2.9 *million* in attorneys fees to Scientology's opponents because Scientology had violated the legal standard against " 'extraordinary, malicious, wanton and oppressive conduct'," had "abused the federal court system by using it, *inter alia*, to destroy their opponents, rather than to resolve an actual dispute," had

brought the case "in bad faith," had made it "abundantly clear that [it] sought to harass the individual defendants and destroy the church defendants through massive over-litigation and other highly questionable litigation tactics," and had acted in a way causing the master to find that he "has never seen a more glaring example of bad faith litigation than this" and that Scientology had "engaged in egregious bad faith litigation conduct." *RTC v. Scott*, U.S. District Court, Central District, Cal., Case No. 85-911 JMI/85-7197-JMI, Memorandum of Decision, January 20, 1993.

Appellate courts also have taken cognizance of Scientology's litigation tactics. In a decision written by subsequent Solicitor General Starr and joined by Judge (now Justice) Ginsberg and Judge Silberman, the District of Columbia Circuit upheld dismissal of a Scientology suit against the federal government and federal officials because Scientology repeatedly refused, on false grounds, to produce Hubbard for a deposition. *Founding Church of Scientology of Washington, D.C., Inc. v. Webster*, 802 F.2d 1448 (D.C. Cir. 1986). Noting that Scientology had mounted a "full-fledged campaign" against the federal government including "theft of government documents . . . wiretapping, infiltration and perjury," *id.* at 1454, and noting that the Tax Court had found that Scientology " 'filed false tax returns, burglarized IRS offices, stole IRS documents, and harassed, delayed and obstructed IRS agents who tried to audit the Church's records,' " *id.*, the D.C. Circuit found that although Scientology had refused to produce Hubbard for deposition on the false claim that he no longer controlled the organization, nonetheless "*Abundant evidence* supports the proposition that Hubbard continued in his *de facto* position as head of the Church." *Id.* at 1454 (emphasis added). The D.C. Circuit mentioned testimony of "plans to conceal Hubbard's acknowledged control over 'all aspects of' the Church of Scientology of California," and held that "Ultimate con-

trol, we have no doubt, he possessed until his death." *Id.* at 1456.

In this case Clearwater (1) could not match the huge pretrial litigation expenditures (described below) made against it by Scientology in pursuit of Hubbard's gospel of litigation *a outrance*, (2) was able to avoid economically induced surrender only because successor counsel accepted drastically reduced, never-raised hourly fees, and (3) had to try to bring the case to a head by a summary judgment motion which conceded religiosity *arguendo* (and which was properly granted by the district court).

G. In addition to itself seeking summary judgment against the amended ordinance in the district court, Scientology also sought attorneys fees for its work against the initial, unamended ordinance during the period from October, 1983 through March, 1984. The amount of lawyers fees for work done for Scientology during this period was, on average, $34,000 per *month*. The claimed hours and fees were so high that, in an effort to make them palatable, Scientology "voluntarily" reduced the number of hours by fifty percent.

The district court denied Scientology's fee request. It's numerous reasons have been stated above.

H. After the district court granted summary judgment for Clearwater on the merits of the amended ordinance and denied the Scientologists' request for attorneys fees for work on the initial ordinance, Scientology appealed the rulings to the Eleventh Circuit. In its appeal regarding fees, Scientology made an argument that was remarkably contradictory to prior arguments it had made. It began to repeatedly imply that, far from its goal being to decimate the law, its major purpose in bringing litigation had been simply to terminate religious discrimination against it and in favor of "mainline" religions.

To show that it allegedly did not object to regulation but only to discrimination, it said that "the Church has

never taken the position that regulation of charitable solicitation in and of itself is constitutionally impermissible, nor has it sought to prohibit such regulation." Reply Brief for Appellant at 1, *Church of Scientology*. It said that "the single most important feature of [its] challenge" to the initial ordinance was (its false claim) that it "was the only one of the many organizations in Clearwater soliciting charitable or religious donations subject to regulation." *Id.* at 2. It repeatedly wrote that, though it had also allegedly won other victories against the initial ordinance, its "Prehearing Memorandum of Law . . . emphasized the importance to [it] of the membership exemption," which it had "attacked . . . as discriminatory." *Id.* at 10. It said it had "argued at length that the [allegedly] unequal treatment of it as compared to other religions worked to its detriment and violated its constitutional rights." *Id.* It said it had "characterized the Ordinance's limited membership exemption as the most important facially discriminatory provision in the ordinance." *Id.* It said that "Most significantly the new ordinance eliminated the limited membership exemption . . . the primary device by which the drafters [allegedly] had attempted to exempt virtually all religious organizations . . . other than [Scientology] from the Ordinance's burdensome requirements." *Id.* at 12.

The logic of Scientology's remarkable, contradictory argument was that it has not complained about regulation in general, though it has spent years fighting regulation on many fronts and trying to decimate Clearwater's law and though disclosure will harm its recruitment efforts, and that it seeks to ensure only that other religions are subjected to all the same regulations to which it is subject.

The Eleventh Circuit gave a good deal of credit to Scientology's remarkable *volte face*—to Scientology's assertion that it had not objected to regulation, but only to purported lack of equal treatment. Thus, though finding Scientology to have been successful on some other matters too, the Circuit also took pains to say that the gravamen

of Scientology's challenge had not been antiregulation, but antidiscrimination: "Scientology prevailed on its asserted right not to be treated differently from other religious organizations. *The gravamen of its challenge was not that the government may not regulate religious organizations, but that it may not do so in a discriminatory manner that favors one religion over another.* . . . That right was plainly vindicated by the repeal of the challenged membership exemption. . . ." *Church of Scientology*, 2 F.3d at 1513.

I. Even though it conceded that "the bulk of the recordkeeping and regulatory provisions [of the initial ordinance] remained intact" in the amended ordinance, i.e., that the provisions encompassing the basic purposes of the law were not touched, the Circuit, as indicated, held that Scientology should receive attorneys fees for its work against the initial ordinance. It ruled that if Scientology "succeeded on any significant issue . . . which achieves some of the benefit it sought," it had met the "threshold" requirement and "must receive a fee award of some kind." *Id.* at 1514. It ruled "irrelevant" the fact that Scientology had to bring all the same broad challenges to the amended ordinance as to the original one. *Id.* It held that alleged Scientology victories on the limited membership exemption and "prosecutorial discretion" were "neither technical nor *de minimus*." *Id.* at 1513. It said, as stated above, that Scientology had succeeded on the "gravamen of its challenge," which purportedly was merely to be free of discrimination rather than to be free of regulation. *Id.*

And though like Scientology's briefs the Circuit gave no particulars of why alleged vagueness had been reduced or eliminated, it ruled that Scientology had forced a clarifying change, and ruled this to be a victory even if the change was *adverse* to Scientology. (Clearwater had argued that the amendments *were* adverse to Scientology.) The reason why even adverse changes were "beneficial" and warrantd fees, ruled the Circuit, is that "Even if a

challenged provision is clarified *against* the plaintiff's interests," it is now *certain* that it is against him. *Id.* (emphasis added).

J. After the Eleventh Circuit's decisions on appeal, Scientology submitted petitions to the Circuit seeking attorneys fees for the appeals. Scientology claimed that even after eliminating 230 hours of work which it admitted was worthless, over $190,000 worth of work had been done on the appeals. This amount of work (plus the admittedly worthless work) was done though the same lawyers had argued the same matters below, had used the same cases, and had made the same arguments. (Clearwater too used the same lawyers, the same cases and the same arguments on the appeals. *Its* bill came to $34,219.) So high was Scientology's claim that, in an effort to persuade the Circuit of *bona fides*, it arbitrarily reduced the bill by 15 percent, though it threatened to restore this reduction if the Circuit did not itself grant the fee award immediately.

At this point, therefore, and even taking account of write offs and reductions to seek favor with the courts, Scientology seeks $293,608.77 for work done against the first ordinance and on appeal. Clearwater does not yet know the amount of fees expended by Scientology in trial court work against the second ordinance, but, based on hours of work and hourly rates claimed for work on the first ordinance and on appeal, it is difficult to see how the amount of trial court work allegedly done against the amended ordinance will be less than $500,000 to $750,000. We note that the total amount of work for Clearwater on all trial court and Eleventh Circuit matters to date by successor counsel who have been on a fee basis since 1984 and 1987, has been $305,235.00.

K. After the Eleventh Circuit's decision on the fee appeal, Clearwater filed a petition for rehearing. The Circuit then took the unusual step of requesting a response from Scientology. The response said nothing new, but no rehearing was granted.

## REASONS FOR GRANTING THE WRIT

### I. THE ELEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S RULINGS THAT FEES CANNOT BE AWARDED UNLESS A PARTY ATTAINS SOME OF THE BENEFIT SOUGHT BY BRINGING SUIT. COMPOUNDING THE PROBLEM, THE CIRCUIT'S RULING WILL RESULT IN INCREASED LITIGATION INSTEAD OF ACCOMMODATION, AND IN FEE AWARDS NEARLY ALWAYS BEING GRANTED TO WEALTHY ORGANIZATIONS.

This Court has ruled that fees can be awarded if a claimant succeeded on any significant issue providing it with benefit sought by bringing suit. *See, e.g., Texas State Teachers*; *Hensley*. This principle was followed by the district court, but the ruling of the Eleventh Circuit is deeply inconsistent with it.

The Scientologists brought a broadside attack intended to decimate the disclosure requirements of Clearwater's initial ordinance because Scientology's recruitment efforts will be harmed if it has to disclose its finances and operations so that potential recruits can learn what it does. Elimination of all or mostly all of the required disclosure was the only benefit of practical importance that Scientology could obtain from the litigation. Mere limitation of (falsely) alleged discrimination between Scientology and other groups claiming religiosity was of *no* practical benefit to Scientology so long as the disclosure requirements remained intact. Scientology does not benefit if *other* groups claiming religiosity have to disclose information. It benefits only if it does *not* have to disclose information.

After enactment of the amended ordinance, Scientology was faced with the same disclosure requirements as under the initial ordinance. That is why, as the district court expressly recognized, it had to make the same numerous constitutional claims against the amended law as against the first one. It had gained none of the practical benefit

for which it had brought the case even if one assumes that the changes in the law were favorable to it. Moreover, most of those changes were *not* favorable to it. They were either neutral or adverse to its interests.

For example, elimination of the limited membership exemption for solicitations of members on an organization's own premises did not cause Scientology to become free of the disclosure requirements. Rather, it *eliminated* any possibility that Scientology could avoid disclosure by confining its Clearwater solicitations to the thousands of Scientologists who visit the Clearwater headquarters for "training."

Changing the law so that the City Attorney could not exercise discretion to investigate but was *required* to investigate if ten complaints were received was neutral or adverse to Scientology's interests, as shown by the fact that Scientology itself complained of alleged discrimination both before *and* after the change.

Changing the law so that the City Attorney could issue documents subpoenas himself, without going to court, certainly was not of benefit to Scientology.

And Scientology has never provided specifics as to how it allegedly benefitted from eliminations of supposedly vague items in the law.

The district court correctly recognized that these supposed "achievements" did not give Scientology a right to fees ever under the standard allowing fees to be awarded if a party has been victorious on any *significant* issue. The Eleventh Circuit sought to elide this correct decision by claiming, contrary to fact, that elimination of alleged discrimination rather than elimination of disclosure was the "gravamen" of Scientology's case, when in fact elimination of disclosure was Scientology's necessity, and by claiming, remarkably, that elimination of (unidentified items of) vagueness were beneficial because they made it certain the law was adverse to Scientology's interests.

*Church of Scientology*, 2. F.3d at 1513. Few litigants would desire the latter "benefit."

Because Scientology's attack on the initial ordinance did not eliminate *any* of the disclosure requirements whose elimination was the reason for bringing the case, and because changes made when the ordinance was amended were peripheral to disclosure and either neutral or adverse to Scientology's interests, the Eleventh Circuit's decision was inconsistent with this Court's rulings. Compounding the problem, the Eleventh Circuit's opinion will discourage governmental bodies from making any changes in laws to accommodate points made by a party opposing the law, will thereby encourage unnecessary litigation, and will almost *always* result in awards of fees whenever civil rights suits are brought by wealthy organizations that can afford to litigate *a outrance*, as is occurring increasingly. The reasons for these compounding effects are clear.

To begin with, if fees are granted for changes which are peripheral or even adverse—and even changes *adverse* to plaintiffs were explicitly held to warrant fees by the Eleventh Circuit—then governmental bodies will be discouraged from making *any* changes in laws if suit was filed. Such changes were made both by Houston in *International Society for Krishna Consciousness v. City of Houston*, 689 F.2d 541 (5th Cir. 1982), and by Clearwater in this case, and are attempts to lessen or avoid litigation. But changes will be self defeating, unaffordable and not made if they are held to warrant fee awards even when the changes are of minimal impact and could be made to accommodate a party without injuring a statute's ability to implement its purposes. Thus instead of changes that accommodate, there will be increased litigation.

Moreover, as discussed below, it is becoming increasingly common for civil rights suits to be brought by large, wealthy organizations, including some of the na-

tion's largest corporations, instead of by the impecunious oppressed for whom Section 1988 was intended. These large organizations often practice litigation to the uttermost, running up enormous legal fees in the event, as does the large and wealthy Scientology. Such expensive litigation, especially when opposed by a defendant with far fewer resources, *always* results in *some* victory for a plaintiff, even if the plaintiff is nonetheless defeated on all main points. Under the Eleventh Circuit's ruling, governments will almost always have to pay at least some part of very expensive fees incurred by wealthy organizations that oppose them.

## II. THE LOWER COURTS HAVE BEEN INTERPRETING 42 U.S.C. SECTION 1988 IN A MANNER NEITHER FORESEEN NOR INTENDED BY CONGRESS AND HAVE CONCOMITANTLY ALTERED THE BALANCE OF POWER STRUCK BY CONGRESS. A CORRECTIVE DECISION BY THIS COURT IS ESSENTIAL.

A. For approximately 10 years a question of major national importance to the proper interpretation of the Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988, has been percolating in the lower courts. Those courts have felt constrained by precedent to follow interpretations inconsistent with the purposes of the Act until this Court speaks to the contrary. The percolating question is presented by this case.

B. For approximately 80 years, the federal civil rights laws lay dormant, unused and unusable. Though intended by Congress to be a weapon in the battle for civil rights, emasculatory late 19th century judicial interpretations made them a mere promise to the ear, broken to the heart. But in the 1960s, as part of the civil rights revolution sparked by *Brown v. Board of Education*, new interpretations by this Court resuscitated the federal civil rights laws.

There was, however, a problem. Ofttimes the persons who would use the civil rights laws could not pay lawyers. They could not afford hourly fees, and their cases were only injunctive or declaratory ones rather than monetary ones that would earn contingency fees for counsel. Thus, though new interpretations opened the door to use of the civil rights laws as a legal matter, the door remained closed as a financial matter.

Congress addressed this financial problem in 1976 by enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. The purpose of this law was "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley*, 461 U.S. at 429. The law was enacted "specifically because [Congress] found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. . . . These victims ordinarily cannot afford to purchase legal services at the rates set by the private market". *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986). Thus, in *City of Riverside* this Court quoted numerous statements in the House and Senate showing that the intent of 42 U.S.C. § 1988 had been to aid not the wealthy, but the impecunious oppressed who were the victims of civil rights violations but could not afford lawyers. The Court said Congress provided for an award of fees

> specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. See House Report, at 3. These victims ordinarily cannot afford to purchase legal services at the rates set by the private market. See *id.*, at 1 ("[b]ecause a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts"); Senate Report, at 2 . . . ("[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which

> to hire a lawyer); see also 122 Cong. Rec. 35127 (1976) (remarks of Rep. Holtzman) ("[p]laintiffs who suffer discrimination and other infringements of their civil rights are usually not wealthy people"); *id.*, at 35128 (remarks of Rep. Seiberling) ("[m]ost Americans . . . cannot afford to hire a lawyer if their constitutional rights are violated or if they are the victims of illegal discrimination"); *id.*, at 31832 (remarks of Sen. Hathaway) ("right now the vindication of important congressional policies in the vital area of civil rights is made to depend upon the financial resources of those least able to promote them").

*City of Riverside*, 477 U.S. at 576-77.

Subsequent to Congress' enactment of Section 1988 in order to aid the impecunious oppressed, this Court furthered the law's intent of vindicating civil rights through providing fees for the non-wealthy: the Court rejected positions that would have injured the non-wealthy through confining fee awards to situations where a plaintiff won a wholesale victory. To encourage civil rights claims for the non-wealthy, the Court held that an appropriate level of fees could be obtained for victory "on any significant issue . . . which achieves some of the benefit . . . sought in bringing suit." *Hensley*, 461 U.S. at 433; *Texas State Teachers*, 489 U.S. at 789.

C. But after Congress enacted and this Court began furthering a law designed to provide access to courts for the impecunious in order to vindicate their claims under the civil rights laws, a new phenomenon arose, one neither foreseen nor intended by Congress. As shown by the pages of America's law reports, the civil rights laws and Section 1988 began to be used not just by the impecunious oppressed who cannot afford lawyers and for whom Section 1988 was enacted, but by wealthy interests, including huge corporations, that regularly employ the largest, most powerful law firms in America as well as other expensive lawyers. The pages of America's law reports thus show civil rights claims, and associated at-

torneys fees claims, made by, among other wealthy interests, organizations such as Hyundai,[2] Nissan,[3] Bloomingdale's,[4] United Nuclear Corporation,[5] Pennzoil,[6] and Scientology, and shows counsel to include such huge firms as Jones, Day, Reavis & Pogue,[7] Latham & Watkins,[8] and Paul, Weiss, Rifkind, Wharton & Garrison,[9] as well as expensive smaller firms much as Scientology's counsel, Rabinowitz, Boudin & Standard, perhaps the leading private civil rights counsel in the country.

It is traditional, as every lawyer and court knows, for large organizations and their counsel to litigate to the hilt, leaving no stone unturned in pursuit of victory and pushing economically weaker opponents to the wall so that the opponents have to settle disadvantageously or surrender because they cannot afford the litigation. Congress, which enacted Section 1988 because it was necessary to provide attorneys fees to the impecunious oppressed, did not foresee and did not intend that attorneys fees would be given to the most powerful companies and law firms in the United States (and would thereby place an additional lever in their hands when opposing state and local governments which may be too financially pressed to devote equivalent resources to the suit). Yet,

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[2] *Hyundai Motor America et al. v. J.R. Huerta Hyundai, Inc.*, 775 F. Supp. 915 (E.D. La. 1991).

[3] *Id.*

[4] *Bloomingdale's By Mail, Ltd. v. Huddleston*, 848 S.W. 2d 52 (Tenn. 1992).

[5] *United Nuclear Corp. v. Cannon*, 564 F. Supp. 581 (D.R.I. 1983). Though not as publicly well known as some of the other companies, United Nuclear is a major company which in the late 1970s won a near-billion dollar lawsuit against Gulf Oil Corporation.

[6] *Crigler v. Pennzoil Co.*, 687 F.Supp. 120 (S.D.N.Y. 1988).

[7] *Bloomingdale's By Mail*, 848 S.W. 2d at 52.

[8] *Hyundai Motor America*, 775 F. Supp. at 916.

[9] *Crigler*, 687 F. Supp. at 121.

even though lower courts know that the language of Section 1988 need not be read to authorize fee awards to the wealthy, and know that the wealth of a fee claimant could be considered a special circumstance making a fee award unnecessary or undesirable, they feel constrained by precedent to award fees to wealthy interests who could and would have brought civil rights litigation even without any prospect of a fee award. *The lower courts feel they cannot change this unless and until this Court acts.* The matter was put succinctly by Ninth Circuit Judge Sneed in a "specially concurring" opinion in *Ackerley Communications, Inc. v. The City of Salem, Oregon*, 752 F.2d 1394, 1398 (9th Cir. 1985) (concurring opinion) (emphases added, footnote omitted):

> While I concur in the opinion of Judge Norris, I do so only because of the precedents he cites and not because of any lack of sympathy with the viewpoint of the district court. That court, as I see it, attempted to interpret the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, so as to focus only on those cases in which the prospect of fee shifting reasonably could be said to have been marginally influential in the decision to litigate. That is, the district court treated section 1988 as if it were intended only to be an inducement to litigate.
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> * * * *
>
> The language of section 1988 would have permitted it to be interpreted as the district court suggests. In my view, it should have been. To have done so would have been in keeping with the admonition to alter the American rule with respect to fees only to the extent required by the intent of Congress. The precedents, however, point as Judge Norris indicates. *Only the Supreme Court can alter that course.* Therefore, I concur.

See also, *International Oceanic Enterprises v. Mentor*, 614 F.2d 502 (5th Cir. 1980); *International Society for Krishna Consciousness v. Collins*, 609 F.2d 151 (5th Cir. 1980).

Not only is the award of fees to the wealthy a phenomenon neither foreseen nor intended by Congress, but it also changes drastically the balance of power struck by Congress in civil rights cases. Prior to enactment of Section 1988, the balance of power lay with state and local governments, since persons who would otherwise have used the civil rights laws could not afford lawyers and therefore could not bring cases. Section 1988 corrected this imbalance and put the two sides on far more of an even footing by providing attorneys fees for the non-wealthy.

Now, however, wealthy interests are also using the civil rights laws, and the award of fees to them changes the balance from that of rough equality to one in which state and local governments are at a serious disadvantage never intended by Congress. Wealthy interests and their counsel can afford to and do engage in expensive litigation *a outrance* whose cost far exceeds what state and local governments can afford to pay in fee awards or what they can even afford to pay their own counsel. Already forced by the expense of litigation to curtail their efforts in pursuit of justified positions, they will be forced to further curtail their litigation efforts, give up justified positions, or surrender totally even prior to litigation lest they risk financial disaster and bankruptcy if they lose in court and must pay huge, unaffordable awards of attorneys fees. This will be a problem for all state and local governments, but especially for small cities and poor counties. It posed a problem for Clearwater in this case because the City simply could not keep up with the enormously expensive pretrial litigation practiced by Scientology.

The situation, and this case in particular, illustrate the accuracy of Justice Kennedy's brief but prescient warning, in a dissenting opinion devoted almost exclusively to issues arising under 42 U.S.C. Section 1983 rather than Section 1988, that the award of fees to powerful economic interests under 1988 would "not vindicate the pur-

poses of . . . § 1988, but merely shifts the balance of power away from the states and toward interstate business." *Dennis v. Higgins*, 489 U.S. 439, 464 (1991) (Kennedy, J., dissenting).

Further exacerbating the departure from Congress' limited intent of assisting the impecunious and from the balance of power struck by Congress, wealthy interests are being awarded fees even if they not only practice litigation to the uttermost, but cross the border limning the unethical. For example, even though Scientology has a judicially documented record of serious misconduct, and stonewalled discovery when litigating against Clearwater, the Eleventh Circuit held that Scientology should receive an award of fees. It did so in the face of explicit Scientology claims that fees should be awarded even if there were discovery abuse. Scientology asserted in its brief that:

> Even if the City were correct that the Church has "obstruct[ed] judicial process" by "stonewall[ing] document discovery" in this case (Brief For Appellees at 11-12, text and n.7), that would not be a special circumstance rendering an award of attorneys' fees unjust. *See, e.g., Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 138 n.38 (3d Cir. 1984) (attorney's alleged misconduct not a special circumstance justifying a reduction of attorneys' fees); *Hall v. Hall*, 738 F.2d 718 (6th Cir. 1984) (plaintiffs' misconduct not a special circumstance); *Mendoza v. Blum*, 560 F.Supp. 284, 288 n.3 (S.D.N.Y. 1983) (failure to appear for deposition not a special circumstance).

D. Thus, the lower courts, as illustrated by the decision of the Eleventh Circuit, have gone far beyond the limited intent of Congress to assist the impecunious oppressed by providing them with fee awards in order to give them access to the judicial process. The lower courts, believing that they are constrained by precedent until this Court acts, are granting fee awards to wealthy

interests that could and would file suit and litigate to the hilt even without fee awards, are granting awards regardless of misconduct by those receiving them, and have drastically changed the balance struck by Congress. Because the lower courts feel constrained until this Court speaks on the matter, a corrective decision from this Court is needed if the intent of Congress and the balance struck by Congress are to be upheld.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Date: April 11, 1994

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# APPENDIX

**APPENDIX**

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

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No. 91-3760

CHURCH OF SCIENTOLOGY FLAG SERVICE, ORG., INC.,
*Plaintiff-Appellant,*

v.

CITY OF CLEARWATER, THOMAS BUSTIN, City Attorney of the City of Clearwater, LUCILLE WILLIAMS, City Clerk of the City of Clearwater,
*Defendants-Appellees.*

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Appeal from the United States District Court
for the Middle District of Florida

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Sept. 30, 1993

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Before ANDERSON and DUBINA, Circuit Judges, and CLARK, Senior Circuit Judge.

DUBINA, Circuit Judge:

Appellant Church of Scientology Flag Service Organization, Inc. ("Scientology") challenges the district court's order denying its petition for attorneys' fees in its civil rights action brought against the appellee, City of Clearwater, Fla. (the "City"). The district court's ruling was

based on its determination that Scientology was not a "prevailing party" under 42 U.S.C. § 1988.[1] Because we hold that Scientology has met the threshold test for prevailing party status, we reverse.

## I. BACKGROUND

In January, 1984, Scientology filed an action under 42 U.S.C. § 1983 to enjoin the enforcement of Clearwater Ordinance No. 3091-83 (the "1983 Ordinance"). The 1983 Ordinance sought to regulate the solicitation of charitable contributions by imposing, *inter alia*, reporting and record-keeping requirements and prohibiting fraudulent representations. The district court conducted a hearing on a motion for permanent injunction and directed counsel to file post-hearing memoranda by March 16, 1984.

On March 15, 1984, the City enacted Emergency Ordinance No. 3479-84 (the "1984 Ordinance"), which repealed the 1983 Ordinance in part, but retained many of its provisions. Thereafter, the district court ruled on Scientology's pending motion to enjoin the repealed 1983 Ordinance. The district court found the 1983 Ordinance facially unconstitutional in its entirety and enjoined its enforcement permanently. On appeal, we vacated that order as moot, reasoning that only the 1984 Ordinance remained in effect. *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 777 F.2d 598 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1973, 90 L.Ed.2d 656 (1986).

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[1] As amended, 42 U.S.C. § 1988, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

On remand, the district court found the 1984 Ordinance to be constitutional in its entirety.[2] Thereupon, Scientology petitioned for attorneys' fees pursuant to 42 U.S.C. § 1988 on the ground that its earlier litigation triggered the City's decision to repeal portions of the offending 1983 Ordinance.

Scientology claims to have "prevailed" on allegations that the 1983 Ordinance discriminated against religious organizations, such as itself, that do not conduct regular prayer meetings. The 1983 Ordinance exempted organizations that solicit funds from "members," defined as "any person regularly attending or participating in a charitable organization." 1983 Ord. § 100.01(5). To be eligible for the exemption, the 1983 Ordinance required organizations to record and disclose the names of members. Scientology alleged that the exemption had been included at the request of mainline denominations in Clearwater and that the principal purpose of the ordinance was to drive Scientology out of Clearwater. Scientology alleged discrimination in violation of the Free Exercise Clause, unwarranted governmental entanglement with religion in violation of the Establishment Clause, both in violation of the First Amendment to the United States Constitution, and a denial of Equal Protection as guaranteed by the Fourteenth Amendment to the United States Constitution. As a result of these challenges to the limited membership exemption and its disclosure requirement, the provision was repealed by the 1984 Ordinance.

Scientology also challenged a provision granting discretion to the City Attorney, upon receipt of ten citizen complaints, to investigate a charitable organization. Reasoning that only "controversial organizations" such as itself would likely be subject to complaints, Scientology argued that the investigative authority was merely a ruse

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[2] That order is the subject of a separate appeal, *Church of Scientology Flag Serv. Org. v. Clearwater*, slip opinion page 3445, —— F.2d —— (11th Cir.1992).

by which to justify city harassment, unbridled by limits on official discretion. The 1984 Ordinance amended the provision by *requiring* the City Attorney to investigate upon receipt of ten complaints.[3]

The 1983 Ordinance, like the 1984 version, required charitable groups to obtain a city permit to solicit funds, imposed a penalty for solicitation without a permit, and authorized judicial review of a decision denying a permit application. Scientology charged that the 1984 Ordinance was overly vague because it did not state whether the penalty could be invoked against an organization that solicited without a permit pending judicial review; if the penalty would have applied in such circumstances, Scientology argued, it would have constituted an improper prior restraint of religious speech. The 1984 Ordinance attempted to pretermit the prior restraint claim by allowing solicitation to continue pending judicial review.

The 1984 Ordinance also eliminated a provision requiring disclosure concerning the tax deductibility of contributions, which Scientology had challenged as discriminatory on its face and as applied. The new ordinance repealed an exemption for organizations soliciting from fewer than twenty members, which Scientology challenged on vagueness grounds, and also clarified other allegedly vague provisions. However, the bulk of the record-keeping and regulatory provisions remained intact.

The district court denied Scientology's fee request, ruling that it had not "prevailed" because, *inter alia,* its rights were not vindicated as a result of its lawsuit. *Church of Scientology Flag Servs. Org. v. City of Clearwater,* 773 F.Supp. 321 (M.D.Fla.1991).

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[3] Although the language of this provision of the 1984 Ordinance appears somewhat ambiguous, the City concedes that it mandates an investigation upon the receipt of ten complaints, whereas the 1983 Ordinance merely conferred discretion to investigate upon receipt of ten complaints.

## II. STANDARD OF REVIEW

A plaintiff must be a "prevailing party" to recover an attorney's fee under 42 U.S.C. § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). We review the factual findings underlying a district court's determination regarding "prevailing party" status for clear error. Fed.R.Civ.P. 52(a); *Fields v. City of Tarpon Springs*, 721 F.2d 318, 321 n. 7 (11th Cir.1983); *Romberg v. Nichols*, 970 F.2d 512, 517 (9th Cir.1992); *see also Perket v. Secretary of Health and Human Services*, 905 F.2d 129, 132 (6th Cir.1990) ("insofar as the district court based its prevailing party determination on a finding that Perket's lawsuit was the catalyst for the reinstatement of his disability benefits, such a finding is a factual conclusion subject to review for clear error"). Whether the facts as found suffice to render the plaintiff a "prevailing party" is a legal question reviewed *de novo*. *Cf. Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir.1978) (analysis has legal as well as factual component). Once a district court has determined that a party has "prevailed," its award of attorneys' fees is reviewed for abuse of discretion. *Markham v. International Association of Bridge, etc.*, 901 F.2d 1022, n. 5 at 1026 (11th Cir.1990); *Taylor v. City of Ft. Lauderdale*, 810 F.2d 1551 (11th Cir.1987); *Solomon v. City of Gainsville*, 796 F.2d 1464 (11th Cir.1986). The scope of the district court's discretion to deny fees to a prevailing party, however, is "exceedingly narrow." *Maloney v. Marietta*, 822 F.2d 1023, 1025 (11th Cir.1987).

## III. ANALYSIS

It is well-settled that a plaintiff is a prevailing party and thus ordinarily entitled to a fee award of "some kind" if the plaintiff has succeeded on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S.

at 433, 103 S.Ct. at 1939 (footnotes omitted), *followed, Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92, 109 S.Ct. 1486, 1493-94, 103 L.E.2d 866 (1989).

> [A]t a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant . . . The touchstone of the prevailing party inquiry [therefore] must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*. . . .

*Texas State Teachers*, 489 U.S. at 792-93, 109 S.Ct. at 1494.

Scientology has met the threshold requirement of "prevailing party" status. It is undisputed that the suit brought by Scientology caused the City to amend the 1983 Ordinance and it is clear that the amendment significantly affected the parties' legal relationship. The 1984 Ordiance abandoned several challenged provisions, including the limited membership exclusion and the provision providing for unfettered City Attorney investigative and prosecutorial discretion. These successes, while partial only, are neither technical nor *de minimis*. *Id.* (citations omitted).

Scientology prevailed on its asserted right not to be treated differently from other religious organizations. The gravamen of its challenge was not that the government may not regulate religious organizations, but that it may not do so in a discriminatory manner that favors one religion over another. *See Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 1683, 72 L.Ed.2d 33 (1982).

That right was plainly vindicated by the repeal of the challenged limited membership exemption, an action which Clearwater conceded at the time was caused by Scientology's articulation of alleged constitutional infirmities. *See Nadeau*, 581 F.2d at 279 (critical inquiry is whether the suit "prompt[ed] defendants to take action to meet plaintiff's claim. . . .").

The same conclusion applies with similar force to a challenge based upon alleged vagueness. Even if a challenged provision is clarified against the plaintiff's interests, he has succeeded in materially altering the legal relationship in a manner that confers some benefit, namely, the certainty of clearly stated legal norms that bind him. In this case, some of the provisions were clarified in Scientology's favor, while others were repealed entirely. *Cf. Texas State Teachers*, 489 U.S. at 792, 109 S.Ct. at 1494 (dictum) (successful challenge of provision as vague might not alone be sufficient to constitute plaintiff as prevailing, especially if provision had never been enforced).

Moreover, it is inappropriate to deny "prevailing party" status merely because Scientology's pleadings in challenging the amended 1984 Ordinance alleged the same or similar constitutional defects as its earlier action. Scientology's challenges were addressed to new features of the amended ordinance, as well as old features carried over from the 1983 Ordinance. The fact that Scientology may (or may not) ultimately prevail in those challenges has little do with the question of whether it prevailed in challenging the repealed provisions of the 1983 Ordinance. Scientology did not fail when Clearwater ceased some of its challenged discriminatory conduct merely because the city persisted in other challenged conduct. For this reason, the fact that Scientology challenges the 1984 Ordinance as invalid is irrelevant. As discussed above, there was a material change in the legal relationship between the parties which benefitted Scientology, and the

fact that Scientology continues to challenge that relationship as modified does not mean that it did not "prevail" as a threshold matter.

## IV. CONCLUSION

Scientology's challenge to the 1983 Ordinance resulted in a material alteration of its legal relationship with the City. It has therefore prevailed for purposes of 42 U.S.C. § 1988. The district court's order denying the fee award is vacated and the case remanded for a determination of the amount of attorneys' fees to which Scientology as prevailing party is entitled.

VACATED and REMANDED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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Case No. 84-96-CIV-T-17

CHURCH OF SCIENTOLOGY FLAG SERVICES ORG., INC.,
*Plaintiff,*

vs.

CITY OF CLEARWATER, *et al.*,
*Defendants.*

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ORDER ON MOTIONS

[Filed July 2, 1991]

This cause is before the Court on the following:

Dkt. 106 Order to show cause before 7/21/87 why this case should not be dismissed for lack of prosecution.

Dkt. 107 Response to the Court's order to show cause why this case should not be dismissed for failure to prosecute by Plaintiff.

Dkt. 108 Motion for attorneys' fees and costs by Plaintiff, filed October 19, 1987.

Dkt. 109 Memorandum of law in support of Plaintiff's motion for attorneys' fees and costs filed October 19, 1987.

Dkt. 110 Affidavit in support of Plaintiff's motion for attorneys' fees with Exhibits A-P attached by Eric M. Lieberman, filed October 19, 1987.

Dkt. 113 Memorandum in response to Plaintiff's application for attorneys' fees and costs by Defend-

ants with Exhibits filed under separate cover, filed November 19, 1987.

Dkt. 117 Reply memorandum in support of Plaintiff's application for attorneys' fees and costs by Johnson & Hayes, counsel for Plaintiff, filed December 16, 1987.

Dkt. 118 Supplemental memorandum of law in support of Plaintiff's application for attorneys' fees and costs by Plaintiff, filed July 14, 1989.

Dkt. 124 Defendants' reply to Plaintiff's supplemental memorandum seeking attorneys' fees for proceedings relating to Clearwater's initial ordinance, filed May 2, 1991.

## FACTS

1. On October 6, 1983, Defendant City of Clearwater (Clearwater) enacted Ordinance No. 3091-83, to become effective January 31, 1984. The purpose of the ordinance was to regulate charitable solicitations within the city. The ordinance required charitable organizations that wanted to solicit funds in Clearwater to register with the city, maintain specified records, disclose the sources and uses of their contributions, refrain from engaging in fraudulent solicitation practices and submit to an investigation by the City Attorney if ten or more individuals complained about the organization's activities. Clearwater patterned the ordinance after a similar Houston ordinance, upheld as constitutional by the Fifth Circuit Court of Appeals. *See International Society of Krishna Consciousness of Houston, Inc* [*ISKCON*] *v. City of Houston,* 689 F.2d 541 (5th Cir. 1982).

2. On January 20, 1984, Americans United for Separation of Church and State (Americans United) brought a ten-count action in the Federal District Court of the Middle District of Florida (the Court) to enjoin Clear-

water from enforcing the ordinance. Each count raised a discrete constitutional claim.

3. On January 23, Plaintiff Church of Scientology Flag Services Organization, Inc. (Scientology) brought a separate twelve-count action for injunctive relief on similar constitutional grounds. Both Plaintiffs moved for temporary restraining orders pursuant to Rule 65(b), Federal Rules of Civil Procedure. Scientology's case Number was 84-96-Civ-T-17 (hereinafter 84-96).

The Court, pursuant to Rule 65(a)(2), Federal Rules of Civil Procedures, consolidated the parties' motions for injunctive relief with the trial on the merits, and scheduled a hearing on the issue of a permanent injunction. At the hearing, the parties requested the Court to limit the scope of the hearing to the facial validity of the ordinance. Clearwater stated that it would not challenge Scientology's standing, except as to the claims alleging that the ordinance violated the freedom of religion clauses of the first amendment. After argument on the facial validity of the ordinance, the Court directed counsel to file post-hearing Memoranda by March 16.

4. On March 15, Clearwater enacted Emergency Ordinance No. 3479-84, as an amendment to Ordinance No. 3091-83. Like Ordinance No. 3091-83, the amended ordinance comprehensively regulated charitable solicitation and effectively repealed Ordinance No. 3091-83. As an emergency ordinance, No. 3479-84 would automatically expire after 90 days if not passed as a non-emergency ordinance within that time. In addition, Ordinance No. 3479-84 explicitly provided for its expiration in 90 days. Clearwater notified the Court and Plaintiffs of the amended ordinance.

5. On March 28, the Court determined that repealed Ordinance No. 3091-83 was unconstitutional and permanently enjoined its application and enforcement. The Court did not specify which of the several counts of the

Plaintiffs' complaints it was deciding. The Court terminated the Americans United case and dismissed all but one count of Scientology's complaint in 84-96, retaining jurisdiction for the enforcement of the executory provisions of its order.

6. On April 5, Clearwater appealed the District Court's injunctive orders as to Ordinance No. 3091-83, pursuant to 28 U.S.C. § 1292(a)(1) (1982). Section 1292 provides that Courts of Appeals have jurisdiction over appeals from interlocutory orders of the District Court's granting or refusing to grant injunctions.

7. On April 20, Scientology, seeking to enjoin the enforcement of Emergency Ordinance No. 3479-84, moved the District Court for leave to amend the remaining count of its 84-96 complaint. The proposed amendment set out the same constitutional challenges that Scientology had raised in opposition to the original ordinance. At the same time, Scientology moved the Court for a temporary restraining order prohibiting Clearwater from enforcing Ordinance No. 3479-84.

8. On May 17, Clearwater enacted Ordinance No. 3479-84 as a permanent ordinance.

9. On May 21, Americans United filed a new action in the District Court seeking injunctive relief and challenging the constitutionality of Ordinance No. 3479-84 on the grounds raised in its previous suit. Simultaneously, Americans United moved for a temporary restraining order, which the Court granted.

10. On May 24, Scientology filed a new suit, seeking essentially the same relief as Americans United. The Case was given the number 84-719-Civ-T-17 (hereinafter 84-719). Scientology's action asked for declaratory and injunctive relief. Scientology contended that:

A) The amended ordinance was enacted to single out Scientology for harassment and persecution in violation

of the establishment and free exercise clauses of the first amendment and the equal protection and due process clauses of the fourteenth amendment;

B) On its face and as applied to all religious groups, the amended ordinance violates the first, fourth, fifth and ninth amendments of the United States Constitution; sections 2, 3, 4, 5, 9, 17, and 23 of Article I of the Florida Constitution; Florida Statutes § 166.04(a); and Clearwater City Charter § 2.09. Scientology alleges that the case arises under 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202.

11. At this point, Scientology had two identical suits pending, 84-719 and 84-96. The two Scientology cases and the American United case challenging amended Ordinance No. 3479-84 were not consolidated by the District Court.

12. On July 13, the District Court heard argument of Americans United and Scientology counsel at a scheduled hearing limited to the question of the facial constitutionality of Ordinance No. 3479-84 in the abstract. The Court did not consider the merits of any of the pending motions or receive any evidence. The Court found that Ordinance No. 3479-84 was facially constitutional. However, the Court encouraged an immediate interlocutory appeal to the Eleventh Circuit Court of Appeals, pursuant to 28 U.S.C. § 1292(b) (1982). The Court also issued a temporary restraining order enjoining Clearwater from enforcing the ordinance pending the disposition of any appeals that might be taken. In its written orders, the Court converted its temporary restraining orders to preliminary injunctions prohibiting Clearwater from enforcing the portions of Ordinance No. 3479-84 that dealt with a charitable organization's obligation to register with the city and to maintain certain records.

13. On July 31, Scientology moved the District Court, in both of its cases, 84-719 and 84-96, for temporary

restraining orders prohibiting Clearwater from enforcing *all* provisions of the Ordinance No. 3479-84. Scientology also moved the Court to schedule an evidentiary hearing on its pending application for a preliminary injunction.

14. On August 2, the Court denied Scientology's motion for a temporary restraining order prohibiting Clearwater from enforcing Ordinance No. 3479-84 and denied Scientology's motion for a hearing on its application for a preliminary injunction.

15. On August 3, Scientology appealed the District Court's July 23 orders declaring Ordinance 3479-84 constitutional and enjoining the enforcement of less than all of Ordinance No. 3479-84. Scientology also appealed the District Court's August 2 order denying Scientology's motion for a temporary restraining order and a preliminary injunction.

16. On November 1, the Eleventh Circuit Court of Appeals.

A) vacated the District Court's order prohibiting Clearwater from enforcing repealed Ordinance No. 3091-83 because the controversy was moot; the Eleventh Circuit remanded the two cases with instructions that they be dismissed without prejudice;

B) dismissed the section 1292(b) interlocutory appeals from the District Court's determination that amended Ordinance No. 3479-84 was facially constitutional; the Eleventh Circuit vacated the orders that allowed the appeals to proceed;

C) affirmed the District Court's refusal to grant Scientology's applications for preliminary injunctions because Scientology failed to establish the criteria necessary for preliminary injunctive relief. The Eleventh Circuit also found that the District Court record did not support an adequate basis to justify a finding of standing.

17. On July 7, 1987, the Court issued an order to show cause before July 21, 1987 why 84-96 should not be dismissed for lack of prosecution.

18. On July 23, Scientology, in 84-719, filed a motion for partial summary judgment on the issue of standing, and on January 15, 1988, in the same case, filed a partial summary judgment on standing and the merits.

19. On October 19, Scientology filed a motion for attorneys' fees and costs in 84-96. Clearwater filed memoranda in opposition to the award of attorneys' fees and costs.

20. On January 15, 1988, Clearwater filed a motion for summary judgment in 84-719.

21. On February 4, 1991, the Court granted Scientology's motion for partial summary judgment against Clearwater on the issue of standing in 84-719, and granted Clearwater's motion for partial summary judgment against Scientology on all issues other than standing in 84-719. The Court held that all sections of Ordinance No. 3479-84 are constitutional. A summary of Ordinance No. 3479-84 appears in Appendix A.

The Court dismisses this case, with prejudice, and denies Plaintiff's motion for attorneys' fees and costs under 42 U.S.C. § 1988. Title 42 U.S.C. § 1988 provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The question here is whether Scientology is a prevailing party. The Court finds that Scientology is not a prevailing party for the following reasons: 1) the lawsuit did not result in the vindication of Scientology's rights; 2) the lawsuit did not result in the cessation of Clearwater's challenged behavior; and, 3) the lawsuit did not cause a material alteration in the legal relationship of the parties. Because the Court determined that Scientology is not a prevailing party, the Court did not

consider whether special circumstances would prevent the award of attorneys' fees, or whether the requested fees were excessive. The Court's reasoning is set out below.

## I. DISMISSAL

This case was administratively closed July 23, 1984, pending completion of interlocutory appeals. The Eleventh Circuit Court of Appeals dismissed those interlocutory appeals on November 13, 1985. No further action was taken in the case until the District Court entered its order to show cause why the case should not be dismissed for failure to prosecute on July 7, 1987.

Scientology litigated its identical claims in 84-719 and the Court granted summary judgment in favor of Clearwater. Scientology is now appealing that decision. Dismissing this case will not foreclose or adversely affect Scientology's litigation of its claims in 84-719. Dismissing the case will promote judicial economy, however. Therefore, the Court dismisses this case, with prejudice.

## II. ATTORNEYS' FEES

### A. *Attorneys' Fees Under 42 U.S.C. § 1988*

Title 42 U.S.C. § 1988 provides that in federal civil rights actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976). A prevailing plaintiff " 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " S. Rep. No. 94-1011, p. 4 (1976) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). The fee amount must be determined on the facts of each case. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (twelve

factors for determining fee amount). *Johnson* indicates the level of a plaintiff's success is relevant to the amount of fees awarded.

A plaintiff must be a "prevailing party" to recover under § 1988. The standard requires that parties succeed on "any significant issue in the litigation which achieves some of the benefit they sought in bringing the suit." *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978), quoted in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (8th Cir. 1983). "Under that standard, at a minimum, the plaintiff must be able to point to a resolution of the dispute which materially alters the parties' legal relationship in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Association, et al. v. Garland Independent School District, et al.*, 489 U.S. 782, 792 (citing *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987)). A plaintiff must "receive at least some relief on the merits of his claim before he can be said to prevail." *Hewitt*, 482 U.S. at 760.

> Where the plaintiff's success on a legal claim can be characterized as purely technical or de minimis, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied. . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award vel non (citations omitted).

*Texas State Teachers*, 489 U.S. at 792-93. One of Congress' goals in enacting § 1988 was to encourage individuals to assume the role of "private attorney generals." *Id.* at 793.

When a plaintiff wins a preliminary injunction against enforcement of an ordinance's provisions, and the or-

dinance is later repealed, a plaintiff is a prevailing party. *Taylor v. Forth Lauderdale*, 810 F.2d 1551 (11th Cir. 1987). However, when an ordinance has been repealed prior to the Court's issuance of a preliminary injunction, the controversy is moot. *Church of Scientology Flag Service Organization v. City of Clearwater*, 777 F.2d 598, 605, 608 (11th Cir. 1985). A temporary court order granted in violation of law and reversed on appeal does not make a plaintiff a prevailing party. A plaintiff cannot be a prevailing party if plaintiff has no right to the relief obtained. *Doe v. Busbee*, 684 F.2d 1375, 1380 (11th Cir. 1980).

"This Circuit permits the award of attorney's fees to a 'prevailing party' if the litigation 'successfully terminates by a consent decree, an out-of-court settlement, a voluntary cessation of the unlawful practice by defendant, or other mooting of the case where the plaintiff has vindicated his right." *Taylor v. City of Fort Lauderdale*, 810 F.2d at 1560 (citing *Doe v. Busbee*, 684 F.2d at 1379). "Analysis hinges upon whether 'the lawsuit is a substantial factor or a significant catalyst in motivating defendants to end their unconstitutional behavior.'" *Taylor v. City of Fort Lauderdale*, 810 F.2d at 1560 (citing *Doe v. Busbee*, 684 F.2d at 1380)). "A party can achieve 'prevailing party' status by establishing a 'clear *causal* relationship between the litigation brought and the practical outcome realized.'" *Ward v. County of San Diego*, 791 F.2d 1329, 1334 (9th Cir. 1986) (citing *Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir. 1983)). *See also, Robinson v. Kimbrough*, 652 F.2d 458, 466 (5th Cir. 1981), withdrawing and vacating 620 F.2d 468 (5th Cir. 1980) (catalyst exists where lawsuit was "a substantial factor or a significant catalyst in motivating the defendants to end their [challenged] behavior.")

Even if a Plaintiff can demonstrate a clear causal link between a lawsuit and a Defendant's resulting conduct, a

Plaintiff does not prevail if Plaintiff does not benefit from the conduct. *Hewitt v. Helms*, 482 U.S. at 760. *See also, Casines v. Murchek*, 766 F.2d 1494, 1503 (11th Cir. 1985) (consistent with the policy underlying section 1988, Plaintiff must in some way vindicate a civil right at issue in the litigation against the violator of that civil right in order to be considered a prevailing party.)

## III. THE PARTIES' CONTENTIONS

Scientology contends that it is entitled to attorneys' fees because the District Court declared repealed Ordinance No. 3091-83 unconstitutional and issued a preliminary injunction enjoining its enforcement. Scientology claims that *Taylor v. Fort Lauderdale*, 810 F.2d 1551 mandates that attorneys' fees be awarded in the present case. In *Taylor, Fort Lauderdale* adopted a charitable solicitation ordinance regulating indoor and outdoor solicitation. A minority religious group alleged that the ordinance was unconstitutional on its face and as applied. Plaintiffs won a preliminary injunction against enforcement of the ordinance's provisions.

The *Taylor* Court then granted Plaintiff's motion for summary judgment with respect to the part of the ordinance dealing with indoor solicitation, intimating that there was no discriminatory application of the outdoor solicitation requirements. The *Taylor* Court did not rule on the latter issue, however. Defendant Fort Lauderdale subsequently repealed the ordinance and enacted a new ordinance. Plaintiffs did not challenge the amended ordinance.

The *Taylor* Court denied Plaintiff's subsequent application for attorneys' fees, but on appeal, the Eleventh Circuit Court of Appeals reversed. The appellate Court stated that Plaintiff's success on the preliminary injunction made it a prevailing party entitled to attorneys' fees and that the subsequent mooting of the case by the recision of the ordinance did not vitiate that success. Scien-

tology compares the facts in *Taylor* to those in the present case and concludes that they are similar. Therefore, Scientology argues, attorneys' fees should be awarded in the present case.

Clearwater argues that Scientology could not be the prevailing party because the order Scientology relied on to claim prevailing party status was vacated by the Eleventh Circuit. Clearwater points out that the Eleventh Circuit held that the preliminary injunction should not have been entered because the case was moot at the time of entry and Scientology had not submitted facts establishing standing to challenge the ordinance. Defendants' Memorandum in Response to Plaintiff's Application for Attorney's Fees and Costs [hereinafter Defendants' Response Memo], pp. 3-4.

Clearwater cites *Doe v. Busbee*, 684 F.2d 1375, and argues that a temporary District Court victory that is granted in violation of law and is reversed on appeal does not make the plaintiff a prevailing party. Clearwater points out that, in *Doe v. Busbee*, the plaintiff obtained preliminary and permanent injunctive and declatory relief in the District Court. While the District Court's orders were on appeal, the Supreme Court issued two decisions that undercut the lower Court's opinion. On remand, the District Court vacated its final judgment and dismissed the Plaintiff's complaint. However, the District Court refused to vacate its prior award of attorneys' fees, stating the Plaintiffs had obtained substantial relief while the injunctions were in effect.

The Eleventh Circuit reversed. After studying the purposes of § 1988, the Circuit Court held that the Plaintiffs were not prevailing parties because "Their successes were merely temporary, and any benefit flowing from their successes in the District Court was awarded under a mistake of law." *Id.* at 1380. Having had no right to the relief obtained, the Plaintiffs were not prevailing parties. *Id.* at 1382.

Clearwater also cites a Ninth Circuit decision, *Ward v. County of San Diego*, 791 F.2d 1329, in which the Circuit Court affirmed a denial of a request for attorneys' fees. The Ninth Circuit held that the Plaintiff's

> lack of standing in her original challenge rendered illusory the practical outcome she temporarily received (the preliminary injunction) . . . An erroneously granted injunction cannot be the basis for an award of attorney fees as the prevailing party.

*Id.* at 1334.

The Court rejects Scientology's claim that *Taylor v. Fort Lauderdale* mandates an award of attorneys' fees in this case. The Court distinguishes *Taylor* on the facts. In *Taylor*, the ordinance was in effect when the District Court granted a preliminary injunction. In the present case, Ordinance No. 3091-83 was not in effect when the District Court declared the ordinance unconstitutional and granted the injunction. *Church of Scientology Flag Service Organization, Inc. v. City of Clearwater*, 777 F.2d at 601. As the Eleventh Circuit Court of Appeals pointed out, "Ordinance No. 3091-83 was no longer in force when the District Court declared it unconstitutional. 'Where by . . . a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly.'" *Id.* at 605.

The Court also distinguishes *Taylor* by the number of complaints the Plaintiff filed. Plaintiff Taylor filed only one complaint against the original ordinance. Taylor neither continued his original suit against the amended ordinance, nor did he file a new complaint against the amended ordinance. Scientology did both. Scientology unlike Taylor, amended its original complaint and continued its original suit against the amended ordinance and in addition, filed a new suit alleging identical claims of unconstitutionality against the amended ordinance. Because the facts in *Taylor* differ from the facts in the pres-

sent case, the Court finds that *Taylor* does not mandate the award of attorneys' fees.

*Vindication of Scientology's Rights and Cessation of Clearwater's Challenged Behavior*

Next, Scientology claims prevailing party status because Clearwater conceded the unconstitutionality of Ordinance No. 3091-83 and adopted amended Ordinance No. 3479-84 in response to Scientology's arguments. Memorandum in Support of Plaintiff's Application for Attorney's Fees and Costs, [hereinafter Plaintiff's Support Memo] pp. 1, 5, 6. Scientology argues that "A judgment is not a prerequisite for a fee award, and a party prevails where there is "voluntary cessation of the unlawful practice by the defendant, or other mooting of the case where the plaintiff has vindicated his right." *Doe v. Busbee*, 684 F.2d at 1379. Scientology argues that Clearwater amended the original Ordinance No. 3091-83 in direct response to its lawsuit and claims that "Where a lawsuit has been the catalyst to obtain voluntary relief against a defendant, fees must be awarded." Plaintiff's Support Memo, p. 10 Scientology cites *Maher v. Gagne*, 448 U.S. 122 (1980); *Martin v. Heckler*, 773 F.2d 1145 (11th Cir. 1985); *Doe v. Busbee*, 684 F.2d 1375; *Iranian Students Association v. Sawyer*, 639 F.2d 1160 (11th Cir. 1981); *Dayan v. Board of Regents*, 620 F.2d 107 (5th Cir. 1980).

The Court rejects Scientology's claim that attorneys' fees should be awarded because Scientology's lawsuit was a catalyst in the District Court's declaring Ordinance No. 3091-83 unconstitutional. Regardless of the role Scientology played in the Court's decision, if the decision did not vindicate Scientology's rights, and motivate Clearwater to end its challenged behavior, Scientology is not entitled to attorneys' fees. *Taylor v. City of Florida Lauderdale*, 810 F.2d at 1560 (citing *Doe v. Busbee*, 584 F.2d at 1375, 1379, 1380). *See also Hewitt v. Helms*, 482 U.S. 755; *Casines v. Murchek*, 766 F.2d 1494.

The Court finds that Scientology's rights were not vindicated as a result of its lawsuit against Ordinance No. 3091-83. The evidence for this finding is the fact that Scientology filed suit against amended Ordinance No. 3479-84 alleging claims almost identical to those it alleged against Ordinance No. 3091-83. Further evidence of this finding is the fact that the parties' legal relationship was not materially altered by the lawsuit. (See section below on the "No Material Alteration of the Legal Relationships of the Parties.")

In addition, Clearwater did not end its challenged behavior as a result of Scientology's lawsuit against Ordinance No. 3091-83. Clearwater adopted Ordinance No. 3479-84 immediately. In a Prehearing Memorandum, Scientology argued, "that in dispositive respects the new ordinance was the same as or even worse than the old one: 'While the new ordinance differs in some respects from its predecessor, what is significant are the ways in which the new ordinance is similar or identical to the very aspects of the old Ordinance which caused this Court to rule it unconstitutional.' Defendants' Response Memo, p. 9.

In the Eleventh Circuit, Scientology told the Court that the amendments did not "truly remove[e] the constitutional infirmities" of the initial ordinance. And in a July 21, 1987 brief to this Court urging that its first case not be dismissed, Scientology said the claims it raised in its second complaint are "identical to those raised in its first. Defendants' Response Memo, p. 10, citing Response of Plaintiff Church to the Court's Order To Show Cause, p. 7. The Court finds that Scientology's argument that it is a prevailing party because its lawsuit was a catalyst in the District Court's action declaring Ordinance No. 3091-83 unconstitutional is not persuasive because Scientology did not vindicate its rights by the lawsuit, nor did Clearwater discontinue the challenged behavior.

*No Material Alteration of the Parties' Legal Relationship*

Scientology claims that it is a prevailing party because it prevailed on significant issues in the litigation that achieved some benefit it sought in bringing the suit. Scientology points out that, after *Texas State Teachers,* prevailing parties no longer have to prevail on the central issue of a case to receive attorneys' fees, but only on "any significant issue in the litigation which achieves some of the benefit they sought in bringing the suit." *Nadeau v. Helgemoe,* 581 F.2d at 278-79, quoted in *Hensley v. Eckerhart,* 461 U.S. at 433. "Under that standard, at a minimum, the plaintiff must be able to point to a resolution of the dispute which materially alters the parties' legal relationship in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Association, et al. v. Garland Independent School District, et al.,* 489 U.S. at 792 (citing *Hewitt v. Helms,* 482 U.S. at 760-61.

In *Texas State Teachers,* Petitioner teachers and teacher organizations sued the school district for the district's regulations prohibiting employee organizations access to school facilities during school hours, prohibiting teachers from communicating among themselves about employee organizations during school hours, prohibiting the use of school mail and internal communications systems by employee organizations, and requiring the district's permission for on-premises, after hours meetings between teachers and employee organizations. On cross-motions for summary judgment the District Court rejected all of Plaintiff's claims except the last one.

On appeal, the Fifth Circuit agreed with the District Court that the prohibition on employee organizations' access to school premises during school hours was not unconstitutional, and affirmed the grant of summary judgment to the school district on this claim. *Texas State Teachers Association v. Garland Independent School Dis-*

*trict*, 777 F.2d 1046 (5th Cir. 1985). But the Fifth Circuit found for the teachers on the issues of teacher-to-teacher discussion of employee organizations and the use of internal mail and bulletin boards for such communication. The Supreme Court summarily affirmed. *Texas State Teachers*, 479 U.S. 801.

The teachers then filed an application for attorneys' fees. The District Court recognized that the teachers had achieved partial success, but concluded that they were not prevailing parties under the central issue/primary relief test in use in the Fifth and Eleventh Circuits. The District Court denied attorneys' fees and the Fifth Circuit affirmed. *Texas State Teachers Association v. Garland Independent School District*, 837 F.2d 190 (5th Cir. 1988). However, the Supreme Court rejected the central issue/prevailing party threshold test for attorneys' fees' eligibility. Instead, the Court ruled that the threshold test was whether the lawsuit led to "the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers*, 489 U.S. at 792.

Scientology claims that it prevailed on two significant issues that materially altered the parties' legal relationship. The first issue was the elimination of the definition of "member" from Ordinance No. 3479-84. The definition, found at Section 100.01(5) of Ordinance No. 3091-83 read, "The term, 'member' shall mean any person regularly attending or participating in a charitable organization." Scientology claims that the definition of member in the original ordinance meant that the ordinance discriminated between Scientology and religions that were more established. Plaintiff's Supplemental Memo, p. 2.

The second issue was the change in the manner in which city officials determined the propriety of investigating complaints against a charitable organization between Ordinance No. 3091-83 and 3479-84. Scientology

claimed that Provision 100.06 in Ordinance No. 3091-83 gave officials "unbridled discretion," to investigate a religion's charitable solicitation practices. Plaintiff's Supplemental Memo, p. 6.

Section 100.06 is set out below. The lined-out portions appeared in Ordinance No. 309183. The underlined portions were added in Ordinance No. 3479-84.[*]

> Section 100.06. Power of the City Attorney to Investigate and Prosecute Prohibited Acts of Charitable Organizations.
>
> 1. The City Attorney **may** ~~shall~~ investigate **the solicitation of funds by charitable organizations** *alleged violations of this chapter* only after ten individuals file separate bona fide complaints in writing, sworn to or affirmed, with the City Attorney, setting forth facts demonstrating that one or more of the prohibited acts set forth in Section 100.05 have been engaged in by the charitable organization and that the complaining party has been injured by each act or acts.
>
> 2. **For purposes of investigating complaints under this section, the City Attorney shall have the power to apply to a court of competent jurisdiction for a subpoena or subpoena duces tecum to bring before him or her any person and to require as part of such subpoena the production of relevant documents and records and to administer oaths and take depositions of any such person so subpoenaed. The City Attorney shall have the power to effect service of process of subpoenas; after approval of such subponena by a court of competent jurisdiction. The willful failure of a person without lawful excuse to obey a subpoena or subpoena duces tecum shall constitute a prohibited act under this chapter. This pro-**

[*] Bold material was struck through in original and italicized material was underlined in original.

**vision does not preempt or supersede any other general laws concerning a refusal to obey a valid subpoena.** *The City Attorney, when conducting an investigation pursuant to subparagraph 1 shall have the power to subpoena any person, require the production of the records or documents described in Section 100.04 and the private statement and records or documents described in Section 100.01(3), and administer oaths.*

**3. In investigating citizen complaints about a charitable organization's solicitation of funds, the City Attorney shall have access to the public records filed by the organization with the City Clerk.**

**4.** *3.* **The City Attorney may commence and maintain in a court of competent jurisdiction all roper and necessary actions and proceedings to prosecute any act prohibited by this chapter.** *If the investigation conducted under subparagraph 1 demonstrates that probable cause exists to believe that violation or violations under Section 100.05 exist, then the City Attorney shall institute an action to prosecute such violation or violations.*

Clearwater argues that the eliminations and alterations cited by Scientology made Scientology's position worse than it was before the changes were made. Clearwater explains that the deletion of the definition of "member" meant that Ordinance No. 3479-84 applied to Scientology's solicitation from its own members. Clearwater points out that Ordinance No. 3091-83, containing the definition, had not applied to organizations' solicitation from their own members.

Clearwater points to the fact that now, after the definition of "member" was eliminated, Scientology claims that Ordinance No. 3479-84 is unconstitutionally overbroad and violates Plaintiff's first amendment rights *because* the ordinance regulates fundraising by churches from their own members and on their own premises.

Clearwater argues that Scientology could not have prevailed on the membership issue because Scientology continues to allege that the membership provision is unconstitutional.

Further, Clearwater claims that Scientology is in a worse position after the changes regarding the City Attorney's power to issue subpoenas. Clearwater explains that Ordinance No. 3091-83 required the City Attorney to apply to a court for authority to issue subpoenas for documents; however, Ordinance No. 3479-84 contains no such requirement. The City Attorney can issue subpoenas without applying to the Court. In addition, Clearwater states, the City Attorney is *required* to investigate if he receives ten bona fide complaints about a group under Ordinance No. 3479-84. Under Ordinance No. 3091-83, the City Attorney did not have to investigate.

Clearwater further points out that Scientology continues to claim that the ordinance unconstitutionally vests excessive and vaguely defined discretion in city enforcement officials. Clearwater points out that Scientology said that enforcement provisions of the new law, and the City Attorney investigatory powers under the new law, were 'substantially identical' to those included in the prior ordinance and that in the amended law 'The regulation of solicitation of members . . . is accomplished by a far more pernicious method' than formerly. Defendants' Response Memo, p. 9, citing Prehearing Memorandum, pp. 10, 13.

Therefore, Clearwater contends, Scientology did not prevail on significant issues that achieved some of the benefit they sought in bringing suit by deleting the definition of member and altering the provision regarding the discretionary power of city officials. Further, Clearwater argues, Scientology did not reach the threshold test for attorneys' fees set out in *Texas State Teachers* because Scientology's lawsuit, and the changes described above did not materially alter the parties' legal relationship.

Clearwater claims that Scientology's actions and representations demonstrate that it is not a prevailing party because Scientology raised all of the same claims in its complaint against amended Ordinance No. 3479-84 that it had raised in its complaint against Ordinance No. 3091-83.

The Court finds unpersuasive Scientology's argument that the changes in the provisions above materially altered the parties' legal relationship. The Court measured the extent of the alteration in the legal relationship by comparing Scientology's allegations as to the membership provisions in Ordinance No. 3091-83 with its allegations as to the membership provisions in Ordinance No. 3479-84. Scientology argued about the membership provisions in Ordinance No. 3091-83:

> In the present case, the Ordinance on its face has a similar disparate effect as did the membership exemption in the *Larson* case, and cannot be justified by a compelling interest.
>
> Most important is the limited membership exemption created by the Ordinance, which exempts from the scope of the Ordinance organizations where 'the solicitation is in the form of a donation or collection that occurred within the membership. . . .' Section 100.01(1). This exemption, however, is significantly narrowed by the definition of "member" as "any person regularly attending or participating in a charitable organization." Section 100.01(5). Thus, only churches which limit their solicitation to those who regularly attend or participate in church services remain exempt. Churches which obtain contributions from members who participate in church services on an episodic basis, as well as church which do not offer, encourage, or require "regular" attendance or "regular" participation of their members, whatever that means are singled out for differential treatment. . . . The Ordinance is Uncon-

> stitutional because it seeks to regulate relations between a church and its members. The Ordinance applies, by its terms, to solicitations by a church of its own members for the general fund-raising purposes of the church, except if the church solicits only from members who regularly attend or participate in church services or activities.

Plaintiff's Prehearing Memorandum of Law [hereinafter Plaintiff's Prehearing Memo], pp. 6, 10.

Scientology argued, about the membership provisions in Ordinance No. 3479-84:

> The Ordinance attempts to regulate solicitations by churches of their own members for the general fundraising purposes of such churches, to regulate relations between churches and their members by compelling disclosure of confidential financial data to members upon request, and to foment dissent within the membership of churches by empowering any individual member to compel disclosure of confidential data.

Complaint, Case 84-719, p. 43.

The similarity of Scientology's objection to the membership provision in Ordinance No. 3479-84 convinces the Court that any alteration in the legal relationship of the party caused by deleting the definition of member was de minimis at best. Therefore, Scientology's claim that it is a prevailing party because the definition of member was deleted is not persuasive.

Likewise, Scientology's argument that it is a prevailing party because changes were made in the city authority's power to investigate is also unpersuasive. Scientology argued about Ordinance No. 3091-83:

> The Clearwater Ordinance is fatally vague in two respects. First, it vests unlimited discretion in the City Attorney for its enforcement, in the following ways:

(1) Under Section 100.06(1), the City Attorney "may," but need not, investigate an organization against which ten complaints have been filed. No standards are set forth to govern the City Attorney's decision whether to investigate.

(2) Similarly, under Section 100.06(4), the City Attorney "May," but need not, institute legal proceedings to prosecute a violation of the Ordinance. No standards are set forth to govern the City Attorney's decision whether to prosecute.

(3) Under Section 100.06(2), the City Attorney may subpoena "any person" and require the "production of relevant documents and records." No standards are established to govern the exercise of this discretionary authority.

(4) Under Section 100.03(2), the City Clerk is empowered to determine the sufficiency of a registration statement and, presumably, to issue a Certificate of Registration. Under Section 100.03(3), the City Clerk can refuse to issue a Certificate of Registration if there is a "compelling and substantial government interest" to justify the denial of a certificate. Any under Section 100.04(2), the City Clerk may determine whether any organization's recordkeeping is insufficient, and may declare a "default" upon such a finding. No standards are established to govern the City Clerk in making these determination, and no explanation is given as to the meaning or consequences of a "default."

(5) Under Section 100.05(1)(b), the City Attorney is empowered to determine the truthfulness and/or sufficiency of a registration statement, and to seek criminal and civil penalties for the filing of an untruthful or insufficient statement. No standards are provided for the exercise of this extraordinary censorship authority.

> Such broad discretion permits, indeed invites, the City Attorney and the City Clerk to engage in selective and discriminatory enforcement, and provides insufficient standards against which his conduct may be measured.

Plaintiff's Prehearing Memo, pp. 28, 29.

Scientology argued, about Ordinance No. 3479-84:

> The City Attorney's power to investigate and prosecute Section 10.05(1)(c) of the Ordinance (which prohibits the "use of any scheme or artifice to defraud or obtain property by means of any false statement or representation") provides another example of the Ordinance's unconstitutional infringement on the relationship between churches and their members . . . the primary vice of the Ordinance lies in the broad and undefined discretion it vests in its enforcing officials. The Clearwater Ordinance confers excessive authority on the Clearwater officials, thereby allowing them not only to engage in selective and discriminatory enforcement, but also to interfere with protected activities in several significant respects.
>
> First, pursuant to Section 100.03(2) of the Ordinance and Section 100.05(1)(b), the City Clerk and City Attorney, respectively, are given the authority not only to determine the sufficiency of registration statement, but in the case of the City Attorney, the trust or falsity of information contained there.
>
> Second, pursuant to Section 100.06, the City Attorney is given extraordinarily broad powers to investigate and prosecute violations of the Ordinance, including by use of subpoenas to compel the production of persons or documents, and by the institution of legal proceedings.

Plaintiff's Memorandum in Support of Its Motion for Partial Summary Judgment [hereinafter Plaintiff's Summary Judgment Memorandum, pp. 32, 42, 43.

Again, the similarity of Scientology's objection to the provision in Ordinance No. 3479-84 convinces the Court that any alteration in the legal relationship of the party caused by the change was de minimis.

The Court also measured the change in the parties' legal relationship by comparing the allegations Scientology made in its complaints against the two ordinances. Scientology's complaint against Clearwater based on Ordinance No. 3091-83 asked for relief based on the issues of allegedly bad motive, allegedly discriminatory impact on Scientology, allegedly unconstitutional requirements of maintaining and disclosing information, alleged overbreadth and vagueness, allegedly excessive discretion given the City Attorney, alleged governmental entanglement with religion, alleged violation of rights of privacy, alleged violation of rights of free speech, and alleged illegality of prohibiting a variety of acts. Scientology's amended complaint in 84-96 against Ordinance No. 3479-83, and its complaint in 84-719 against Ordinance No. 3479-84 rest on essentially the same allegations as its original complaint against Ordinance No. 3091-83.

Neither Scientology nor Clearwater cited a case that set out the meaning of "materially altering the legal relationship of the parties," and the Court did not find a case exactly on point. However, *Stefan v. Laurenitis*, 889 F.2d 363, 369 (1st Cir. 1989), provided some guidance. The *Stefan* Court held that a monetary settlement is "a resolution of the dispute which changes the legal relationship" between the parties *Stefan*, 889 F.2d at 369 (citing *Texas Teachers*, 489 U.S. at 792) when the settlement was not *de minimis* and the settlement might deter future harassment of Plaintiffs.

This Court does not imply that a monetary settlement must be present to materially alter the legal relationship;

the Court does, however, insist that a material alteration in the parties' legal relationship in the Plaintiff's favor result before the Court can determine that Plaintiff is a prevailing party deserving of attorneys' fees. When, as in this case, Plaintiff remains in essentially the same position, or perhaps in a worse position after a lawsuit, the Court cannot find that Plaintiff prevails. The similarity of Scientology's allegations in its suits against Ordinance No. 3091-83 and Ordinance No. 3479-84 convinces the Court that there was no material alteration in the parties' legal relationship as a result of Plaintiff's lawsuit 84-96.

The Court finds that Scientology did not meet the test for prevailing party status because its lawsuit in 84-96, did not vindicate Scientology's rights; did not force Clearwater to cease its challenged behavior; and did not materially alter the legal relationship between Scientology and Clearwater. Therefore, Scientology's motion for attorneys' fees is denied. Accordingly, it is

ORDERED that Case No. 84-96-Civ-T-17 is dismissed, with prejudice; it is further

ORDERED that PLAINTIFF CHURCH OF SCIENTOLOGY FLAG SERVICES ORGANIZATION's motion for attorneys' fees in Case No. 84-96-Civ-T-17 is denied.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 1st day of July, 1991.

## APPENDIX A

## CLEARWATER ORDINANCE 3479-84

Clearwater Ordinance 3479-84 applies to charitable organizations that solicit funds or property within Clearwater and to charitable organizations that offer within the city to make sales of property including, but not limited to books, tapes, publications and brochures whose proceeds will be used for charitable purposes. Section 100.01. The ordinance exempts organizations that annually collect monies from less than twenty people in Clearwater or that annually collect less than $10,000 there. Section 100.02.

Covered organizations must file a registration statement with the City Clerk. Section 100.03. The statement requires the organization to provide information about the collection and disbursement of funds, including names, addresses, and phone numbers of the soliciting organization, the person in charge of soliciting funds in Clearwater, and the person authorized to disburse those funds; a description of the soliciting organization, the methods of solicitation and the use to be made of the funds; the time period of the solicitation; and estimate of salaries, fees and costs to be incurred in soliciting,; the names of organization officials or solicitors who have been 'convicted of serious crimes in the last five years; the names of other Florida cities in which the organization has solicited; and a statement that the organization maintains records or documents necessary to file the registration statement. The registration is a public document.

An organization that files similar information elsewhere may submit that filing in lieu of the registration statement. An organization that solicits only from members may provide the information to its members in a private statement, available only to members, in lieu of the registration statement. The organization must prepare the statement at least annually, must maintain the under-

lying records for three years from the date of each statement, and must make the records and statement reasonably available for inspection by each member of the charitable organization. Section 100.02(3).

After an organization files its registration statement, the City Clerk must either issue a Certificate of Registration within ten working days or tell the organization what required information is missing from the statement. Section 100.03(2). If the Clerk does not issue a Certificate of Registration, the organization can continue to solicit in Clearwater without the statement until the Clerk's decision is upheld by a court. Section 100.03(3). The City bears the burden of initiating court proceedings, which it must do within ten working days of the refusal of a permit. *Id.* In such proceedings, the organization can show that the missing information should not be required because furnishing it would impose a special hardship on the organization. Section 100.03(4).

The registration statement is effective for one year. Sixty days after the year is over, the organization must file a statement containing information as to the amount of funds and property collected in Clearwater during the year; the costs incurred for wages, fees, advertising, and other expenses; and the utilization of the proceeds in approximate amounts. Section 100.03(8).

Under the ordinance, certain acts are unlawful. These include willful failure to file required statements or knowingly filing false statements, fraud or misrepresentation to obtain money or property; promising any person that the proceeds of a solicitation of funds will be refunded upon request, and thereafter willfully failing to make a written refund request within 60 days; promising any person that he or she will receive a refund upon request without providing a written statement of the refund terms and conditions; knowing misrepresentation that donor will obtain a federal tax deduction, willful use of solicited

funds to commit a crime, and willful failure to maintain required records. Section 100.05.

The City Attorney is empowered to investigate alleged violations of the ordinance, but only if he has received ten bona fide, sworn complaints setting forth facts showing a violation and harm. Section 100.06(1). In an investigation, the city attorney can subpoena persons and records, Section 100.06(2), but he has no power to enforce his subpoenas and must go to court for enforcement. If an investigation shows probable cause to believe a violation exists, the City Atorney can prosecute. Section 100.06(3). Finally, the statute contains an explicit severability clause.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 91-3760

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CHURCH OF SCIENTOLOGY FLAG SERVICE, ORG., INC.,
*Plaintiff-Appellant,*

versus

CITY OF CLEARWATER, THOMAS BUSTIN, City Attorney of the City of Clearwater, LUCILLE WILLIAMS, City Clerk of the City of Clearwater,
*Defendants-Appellees.*

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On Appeal from the United States District Court
for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

[Filed Dec. 14, 1993]

Before: ANDERSON and DUBINA, Circuit Judges and CLARK, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 91-3760

---

D. C. Docket No. 84-96-CIV-T-17

CHURCH OF SCIENTOLOGY FLAG SERVICE, ORG., INC.,
*Plaintiff-Appellant,*

versus

CITY OF CLEARWATER, THOMAS BUSTIN, City Attorney of the City of Clearwater, LUCILLE WILLIAMS, City Clerk of the City of Clearwater,
*Defendants-Appellees.*

---

Appeal from the United States District Court
for the Middle District of Florida

---

Before ANDERSON and DUBINA, Circuit Judges, and CLARK, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby VACATED; and that this

cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 30, 1993

For the Court: Miguel J. Cortez
Clerk

By: /s/ Matt Davidson
Deputy Clerk

Issued as Mandate: Feb. 28, 1994

## ORDINANCE NO. 3479-84*

AN ORDINANCE OF THE CITY OF CLEARWATER, FLORIDA, AMENDING SECTION 100.01, DEFINITIONS, SECTION 100.02, EXEMPTIONS, SECTION 100.03, REGISTRATION WITH CITY CLERK, SECTION 100.04, MAINTENANCE OF RECORDS, SECTION 100.05, PROHIBITED ACTS, SECTION 100.06, POWER OF THE CITY ATTORNEY TO INVESTIGATE AND PROSECUTE PROHIBITED ACTS OF CHARITABLE ORGANIZATIONS, SECTION 100.07, DAMAGE TO INJURED PERSONS, SECTION 100.08, NOTICE TO THE PUBLIC ABOUT THE PROVISIONS OF THIS CHAPTER, OF CHAPTER 100, SOLICITATION OF FUNDS FOR CHARITABLE PURPOSES, OF TITLE VIII, PUBLIC HEALTH AND SAFETY, OF THE CODE OF ORDINANCES, CITY OF CLEARWATER; TO REVISE AND SHORTEN THE DEFINITION OF THE TERM "CHARITABLE ORGANIZATION"; TO REVISE AND EXPAND THE DEFINITION OF THE TERM "SOLICIT FUNDS" TO INCLUDE A SERIES OF ITEMS WHEREUPON REPRESENTATION OF THE PROCEEDS OF THE SALE OF SUCH ITEMS WILL BE USED FOR THE CHARITABLE PURPOSE; TO REMOVE THE DEFINITION OF THE TERM "MEMBER" AND THE DEFINITION OF THE TERM "NATIONAL ORGANIZATION"; TO REVISE AND SHORTEN THE DEFINITION OF THE TERM "PROFESSIONAL SOLICITOR"; TO REVISE EACH OF THE EXEMPTION CATEGORIES AND REMOVE LANGUAGE RELATING TO FUNDS IN EXCESS OF $10,000; TO REMOVE LANGUAGE RELATING TO THE MAINTENANCE OF RECORDS; TO REMOVE LANGUAGE RELATING TO THE ISSUANCE OF AN ANNOUNCEMENT OR ADVERTISEMENT; TO RE-

[*] Bold material was struck through in original and italicized material was underlined in original.

QUIRE IN THE REGISTRATION STATEMENT AN ESTIMATED PERCENTAGE OF THE TOTAL PROJECTED COLLECTIONS WHICH THE COSTS OF SOLICITATION WILL COMPRISE; TO REQUIRE IN THE REGISTRATION STATEMENT THAT A CHARITABLE ORGANIZATION WILL MAINTAIN THE RECORDS AND DOCUMENTS NECESSARY TO FILE THE REPORTING STATEMENT AND PROVIDE A DESCRIPTION OF THOSE RECORDS AND DOCUMENTS; TO REQUIRE THE FILING OF A DECLARATORY JUDGMENT ACTION WHERE THE CITY CLERK HAS DENIED ISSUANCE OF A CERTIFICATE OF REGISTRATION AND THE CHARITABLE ORGANIZATION DISAGREES WITH SUCH DECISION; TO PERMIT THE CHARITABLE ORGANIZATION TO SOLICIT FUNDS WITHOUT COMPLIANCE WITH THE REGISTRATION PROVISION UNLESS AND UNTIL THE CIRCUIT COURT RULES THAT THE CITY CLERK'S REFUSAL TO ISSUE THE CERTIFICATE WAS PROPER; TO EXPAND THE SCOPE RELATING TO THE FILING BY A CHARITABLE ORGANIZATION OF ANY SIMILAR REGISTRATION STATEMENT FILED IN ANY STATE, CITY OR COUNTY TO PERMIT THE FILING OF THE SAME WITH THE CITY CLERK; TO REWORD THE REPORTING AND DISCLOSURE PROVISION TO CLARIFY WHAT MONEY AND PROPERTY IS TO BE DISCLOSED; TO REQUIRE THAT CHARITABLE ORGANIZATIONS MAINTAIN RECORDS OR DOCUMENTS NECESSARY TO FILE COMPLETE AND TRUTHFUL STATEMENTS REQUIRED BY SECTION 100.03 FOR A PERIOD OF THREE (3) YEARS FROM THE FILING OF EACH STATEMENT AND TO DISPENSE WITH ALL OTHER MAINTENANCE FUNCTIONS; TO DELETE THE POWER OF THE CITY CLERK TO DECLARE A DEFAULT; TO REWORD AND CLARIFY INDIVIDUAL SUBPARAGRAPHS OF THE PROHIBITED

ACTS AND TO ADD NEW PROHIBITED ACT RELATING TO THE WILLFUL FAILURE TO MAINTAIN THE RECORDS OR DOCUMENTS REQUIRED BY SECTION 100.04; TO ADD A NEW PROHIBITED ACT RELATING TO PRIVATE STATEMENTS; TO MAKE THE INVESTIGATION TO BE PERFORMED BY THE CITY ATTORNEY MANDATORY IN CHARACTER; TO GRANT THE CITY ATTORNEY SUBPOENA POWER WITH RESPECT TO THE RECORDS OR DOCUMENTS DESCRIBED IN SECTION 100.04; TO DELETE THE SUBPARAGRAPH RELATING TO THE CITY ATTORNEY'S ACCESS TO PUBLIC RECORDS AS BEING UNNECESSARY IN LIGHT OF CHAPTER 119, FLORIDA STATUTES; TO PERMIT THE CITY ATTORNEY TO PROSECUTE VIOLATIONS OF THE PROHIBITED ACTS WHERE PROBABLE CAUSE EXISTS; TO PERMIT A CHARITABLE ORGANIZATION TO EXCLUDE SOLICITATION INFORMATION RELATING TO MEMBERS FROM ITS REGISTRATION STATEMENT WHERE A PRIVATE STATEMENT IS MAINTAINED; AND TO CHANGE INDIVIDUAL WORDS AND PUNCTUATION FOR SENSE AND CLARITY; PROVIDING FOR THE REPEAL OF ALL ORDINANCES IN CONFLICT HEREWITH TO THE EXTENT OF SUCH CONFLICT; PROVIDING FOR THE SEPARABILITY OF THE PROVISIONS HEREOF; PROVIDING FOR AN EMERGENCY PURSUANT TO SECTION 166.041, FLORIDA STATUTES; DECLARING THAT THE CITY OF CLEARWATER IS EXEMPT FROM PINELLAS COUNTY ORDINANCE 82-38; DECLARING THAT A PUBLIC EMERGENCY EXISTS AFFECTING THE WELFARE OF THE CITIZENS OF THE CITY OF CLEARWATER; AND PROVIDING FOR THE EFFECTIVE DATE OF THIS ORDINANCE.

WHEREAS, the City of Clearwater, Florida, is presently involved in litigation directed toward the validity

of Chapter 100 of the Clearwater Code of Ordinances; and

WHEREAS, Fifth Circuit Judge Wisdom, in similar litigation involving the City of Houston, Texas, commended the City for further narrowing its ordinance during the pendency of that litigation; and

WHEREAS, it would further serve the purposes for which Chapter 100 was created to narrow and refine the scope of each provision and thereby preserve the integrity of that chapter and the public purposes it serves; and

WHEREAS, just like the City of Houston, it is felt that further refining and narrowing should be accomplished prior to the conclusion of the litigation mentioned herein; and

WHEREAS, an emergency exists within the City of Clearwater in that it is immediately necessary that the scope and wording of Chapter 100 of Clearwater Code of Ordinances be further narrowed and refined by addressing each and every narrowing type question that could be raised prior to the termination of the litigation mentioned herein, thereby preserving and enhancing the public purpose for the ordinance and the welfare of the citizens of the City of Clearwater.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF CLEARWATER, FLORIDA;

Section 1. That Section 100.01, Definitions, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.01. Definitions.

As used in this chapter,

(1) The term "charitable organization" shall mean an organization or person which is or holds itself

out to be a benevolent, educational, voluntary health, philanthropic, humane, religious or eleemosynary organization that solicits *funds* **or obtains contributions solicited from the public** for charitable purposes. **A branch, area, chapter, office or similar affiliate or any person soliciting contributions within the City of Clearwater for a charitable organization that has its principal place of business outside the City shall be a charitable organization for the purposes of this chapter.**

(2) The term "solicit funds" or "solicitation of funds" shall mean any request, within the City of Clearwater, for the donation of money, property, or anything of value, or the pledge of a future donation of money, property, or anything of value; or the selling or offering for sale of any property, real or personal, tangible or intangible, whether of value or not, *including, but not limited to, goods, books, pamphlets, tickets, publications or subscriptions to publications, or brochures, upon the representation, express or implied, that the proceeds of such sale will be used for a charitable purpose as such term is herein defined.* Expressly excluded from the meaning of "solicit funds" or "solicitation of funds" is any offer of membership in any charitable organization. A solicitation of funds is complete when the solicitation is communicated to any individual then located within the corporate limits of the City.

(3) The term "charitable purpose" shall mean benevolent, philanthropic, educational, religious, humane, voluntary health, or other non-profit objectives, including the benefit of poor, needy, sick, refugee or handicapped persons; the benefit of any church or religious society, sect, group, or order; the benefit of any fraternal, social or civil organization, or the benefit of any educational institution. The term "charitable purpose" shall not be construed

to include the direct benefit of the individual making the solicitation. The term "charitable purpose" shall not be construed to include the benefit of any political group or political organization that is subject to financial disclosure under state or federal law.

(4) The term "individual" shall mean only a natural person.

**(5) The term "member" shall mean any person regularly attending or participating in a charitable organization.**

**(6) The term "national organization" means that part of a charitable organization that coordinates, supervises, or exercises control over policy, fund raising, or expenditures, or assists or advises one or more chapters, branches, areas, offices, or affiliates in the City.**

(7 *5*) The term "professional solicitor" means **any person who, for a financial or other consideration, solicits contributions for, or on behalf of, a charitable organization whether such solicitation is performed personally or through agents, servants, or employees specifically employed by or for a charitable organization, who are engaged in the solicitation of contributions under the direction of such person; however, no agent, servant, or employee of a professional solicitor shall be deemed to be a professional solicitor. A bona fide salaried officer or employee of a charitable organization maintaining a permanent establishment within the state shall not be deemed to be a professional solicitor. No attorney, registered investment counselor, CPA or accountant, or banker who advises any person to make a contribution to a charitable organization shall be deemed, as a result of such advice, to be a professional solicitor** *any person who is compensated for his or her or its solicitation of funds for charitable purposes in any manner whatsoever that is based on*

*or related to the amount of money or property collected as a result of his or her or its solicitation of funds.*

Section 2. That Section 100.02, Exemptions, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.02. Exemptions.

(1) Notwithstanding the foregoing, a charitable organization *that does not employ a professional solicitor to solicit funds* shall be exempt from the provisions **of this chapter** *of Sections 100.03 and 100.04; (a)* if it **does** *did* not **receive contributions** *collect money or property* from more than 20 persons *as a resutl of the solicitation of funds during the preceding twelve (12) months;* **or** *(b) if* all of its functions, including fund raising activities, *within the City of Clearwater,* are carried on by persons who are unpaid for their services; or *(c)* if no part of the *charitable* organization's assets or income inures to the benefit of or is paid to any officer or member; **or if the solicitation is in the form of a donation or collection that occurred within the membership of the charitable organization; or** *(d)* if the charitable organization **does not raise or receive contributions from the public** *did not collect money or property as a result of the solicitation of funds* in excess of $10,000 during **its annual reporting period** *the preceding twelve (12) months.* **Nevertheless, if the contributions raised from the public are in excess of $10,000 for said annual reporting period, the charitable organization shall, within 88 days after the date it shall have received total contributions in excess of $10,000, register subject to the provision of this chapter. Any such exempt charitable organ-**

**ization shall lose such exemption when it employs a professional solicitor. Nevertheless, such organization shall maintain such records as necessary to prove that the organization qualifies for such exemption.**

(2) Every scholarship fund that solicits and raises funds solely for the purpose of providing scholarships shall be exempt from the registration provisions provided for in this chapter if all of the fund's functions, including fund raising activities, are carried on by persons who are unpaid for their services and if no part of the organization's assets or income inures to the benefit of, or is paid to, any officer or member.

**(3) The issuance of any announcement or advertisement that such solicitation as described in subsection (2) above will occur or which announces or advertises an event at which unannounced solicitation as described in subsection (2) above occurs shall be exempt from the registration provisions of this chapter.**

*(3) If a charitable organization does not want to disclose publicly the information required by the statements described in Section 100.03 regarding the solicitation of funds from members of the charitable organization, it may exclude this information from the statements required by Section 100.03 if:*

*(a) it indicates on the statements required by Section 100.03 that information about solicitation of funds from members of the charitable organization has been excluded, and*

*(b) it prepares a private statement at least annually that contains all of the information required by the statements described in Section 100.03 for the solicitation of funds from members of the charitable organization that is not reported in the statements required by Section 100.03, which is signed under*

*oath by the individual described in subparagraph 1(o) of Section 100.03, and*

*(c) it maintains the records and documents that are necessary to complete this private statement for a period of three years from the date of each statement, and together with the private statement, makes them reasonably available for inspection by every member of the charitable organization.*

Section 3. That Section 100.03, Registration with City Clerk, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.03. Registration with City Clerk

1. All charitable organizations soliciting funds **or desiring to solicit funds** for a charitable purpose in the City of Clearwater **shall maintain records, documents and information and** shall file a registration statement on forms provided by the City Clerk on or before January 31st of each year. At the time of filing such registration statement, the charitable organization shall pay a registration fee of $10.00. The forms shall contain the following information:

(a) The name of the person registering and desiring to solicit funds for charitable purposes.

(b) Whether the person registering is a natural person, partnership, corporation, or association and,

(i) if a natural person, the business or residence address and telephone number must be given.

(ii) if a partnership, the names of all partners and the principal business address and telephone number of each partner must be given.

(iii) if a corporation, the person registering must state whether it is organized under the laws of Florida or is a foreign corporation, and must show the mailing address, business location, telephone number, name of individual in charge of soliciting funds in Clearwater of such corporation, and the names of all officers and directors or trustees of said corporation, and, if a foreign corporation, the place of incorporation and registration date and certificate to operate in Florida as a foreign corporation.

(iv) if an association, the registration statement shall show the association's principal business address and telephone number, if any, and shall show names and principal business or residence addresses and telephone numbers of the officers and directors or trustees of the association. If the association is part of a multi-state organization or association, the mailing address and business location of its central office shall be given, in addition to the mailing address and business location of its local office.

(c) A reference to all determinations of tax-exempt status under the Internal Revenue Code of the United States and law of any state, and the laws of any county or municipality.

(d) A brief description of the charitable organization registering, the charitable purpose for which the funds are to be solicited, and a brief explanation of the intended use of the funds toward that purpose.

(e) The names, mailing address and telephone number of all individuals authorized to disburse the proceeds of the solicitation.

(f) The names, mailing address and telephone number of all individuals who will be in direct charge or control of the solicitation of funds.

(g) The time period within which the solicitation of funds is to be made, giving the date of the beginning of solicitation and its projected conclusion.

(h) A brief description of the methods and means by which the solicitation of funds is to be accomplished.

(i) An estimated schedule of salaries, wages, fees, commissions, expenses and costs to be expended and paid in connection with the solicitation of funds and in connection with their disbursement, *and an estimated percentage of the total projected collections which the costs of solicitation will comprise.*

(j) The names of any other cities in Florida in which the person registering has **solicited** *collected* funds for charitable purposes within the past five (5) years, but in **no** *the* event that the person registering has **solicited** *collected* funds for charitable purposes in more than five (5) other cities in Florida, the person registering may list the five (5) cities in Florida in which the most recent **solicitations** *collections* occurred.

(k) A statement to the effect that if a Certificate of Registration is granted, such Certificate will not be used as or represented to be an endorsement by the City or any of its officers or employees.

*(l) A statement to the effect that the charitable organization will maintain records or documents that are necesasry to file the complete statement required by subparagraph 8 of this section and a brief description of those records or documents.*

(l *m*) The names of any officer, director, trustee, partner, or any current agent or employee engaging in solicitation of funds who has been convicted of a felony or a misdemeanor involving moral turpitude within the past seven (7) years, the nature of the

offense, the State in which the conviction occurred, and the year of such conviction.

(**m** *n*) A brief explanation of the reasons, if the person registering is unable to provide any of the foregoing information, why such information is not available.

(**n** *o*) The registration statement must be signed by the applicant, if the person registering is an individual; if the person registering is a partnership, by the partner charged with disbursing funds solicited; if a person registering is a corporation or an association, by its officer charged with disbursing funds solicited. The individual signing the registration statement shall sign the statement and swear before an officer authorized to administer oaths that he or she has carefully read the registration statement and that all the information contained therein is true and correct.

2. After a review of the registration statement to determine its compliance with this section, and within ten (10) working days of the receipt of the registration statement, the City Clerk shall either issue a Certificate of Registration, as provided in this section, or notify the person registering that the registration statement does not comply with the requirements of this section and specifically point out what information or explanation has not been furnished that is required before a Certificate of Registration will be issued.

3. If for any reason the City Clerk refuses to issue a Certificate of Registration to any charitable organization *that has filed a registration statement and the charitable organization disagrees with this decision*, the City of Clearwater shall bear the burden of initiating, within ten working days of the denial, *a* judicial **review** proceedings in a court of competent **jurisdiction to review the City Clerk's**

**administrative decision** *in the form of a declaratory judgment action pursuant to Chapter 86, Florida Statutes, to review the City Clerk's refusal to grant a registration certificate.* In any such proceeding, the charitable organization *seeking the Certificate of Registration* shall be considered a party in interest, and shall have the absolute right to receive a set of **all review papers, to appear by its own counsel, and to submit any and all documents and papers in opposition to the denial of a Certificate of Registration, and shall have the further right to appeal or to join in any appeal from a final adverse judgment or order. The City shall bear the burden of demonstrating in the administrative review that a compelling and substantial governmental interest exists on the record justifying the denial of the Certificate of Registration in the specific instance.** *Unless or until the circuit court rules that the City Clerk has properly refused to issue a Certificate of Registration, the charitable organization may solicit funds without compliance with the registration provisions of this chapter.*

4. In such judicial review proceedings, a charitable organization may also raise the question to the court that furnishing a specific item or items of information or explanations under this **section** *chapter* constitutes a special or unique hardship to the *charitable* organization, and the court shall have jurisdiction in such review process, upon concluding that disclosure constitutes a unique or special hardship, to dispense with the furnishing of that information or explanation, so that a Certificate of Registration can be issued.

5. The City Clerk shall prescribe the form of the Certificate of Registration. However, each such Certificate of Registration shall be printed in black except that the following shall be printed prominently thereon in red: "The issuance of this Certificate of

Registration is not an endorsement by the City of Clearwater or any of its officers or employees". Nor may the Certificate of Registration be used by any charitable organization for promotion purposes. Each Certificate of Registration shall bear a registration number that is the same as the file containing the registration statement filed by the registrant.

6. Any charitable organization as defined in Section 100.01(1) that has filed a registration statement with **the State of Florida, Pinellas County, or any other municipality or county located in Florida** *any state, city or county* during the preceding twelve (12) months containing substantially the same information *under oath* as requested in this section and has been issued a registration certificate, may file a copy of such registration statement and registration certificate with the City Clerk and such charitable organization shall be deemed to have complied with the requirements of Section 100.03 relating to the preparation and filing of a registration statement as long as such prior filing and registration certificate remains valid.

7. All registration statements filed with the City Clerk, whether or not a Certificate of Registration has been issued, shall be a public record and shall be available for inspection by members of the public during regular business hours and copies may be obtained at the regular cost.

8. Within 80 days from the expiration of the Certificate of Registration, the charitable organization shall file with the City Clerk on forms provided by that office a statement regarding all solicitation of funds for the prior year, which statement shall be sworn by an appropriate officer of the charitable organization and which sworn statement shall show the following: (a) the full amount of **funds and/or other property received from the public** *money and*

*property collected as a result of the solicitation of funds* during the **previous year** *annual reporting period;* (b) a complete list of any and all expenses incurred in procuring **the said** *those* funds. The **said** list shall be broken down into salaries, wages, fees, commissions, advertising and all other expenses and costs paid in connection with *the* solicitations *of those funds;* (c) the bank, if any, where the proceeds of **the said** *those* solicitations *of funds* were placed; and (d) actual or proposed utilization in approximate amounts of the said proceeds.

Section 4. That Section 100.04, Maintenance of Records, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.04. Maintenance of Records.

1. No Charitable organizations shall **fail to** maintain records or documents that are necessary to file *the* complete and truthful **registration** statements under **this chapter** *required by Section 100.03 for a period of three (3) years from the filing of each statement.* **Records and documents in this paragraph refer to the information mandated by Section 100.03 and shall be maintained by the charitable organization for a period of three (3) years from registration. A charitable organization, upon the request of the City Attorney in connection with an investigation into possible violations of this chapter, may not refuse to produce information required in the registration statement.**

**Any charitable organization that is exempt from the provisions of this chapter pursuant to Section 100.02(1) shall not be required to maintain any records or other documents relating to such exemption for more than six (6) months from the date that it**

**solicits or obtains contributions solicited from the public for charitable purposes.**

**2. If the City Clerk determines that any organization subject to this chapter has failed to maintain documents or records containing information sufficient for the purposes of filing a registration statement, he or she shall notify such organization in writing and specify what information it has failed to maintain. If any such organization fails for thirty (30) working days after receipt of notice to provide sufficient evidence of the maintenance of such records and documents without legal excuse, the City Clerk shall declare a default, and such default shall constitute sufficient grounds for the City Attorney to seek and obtain judicial enforcement of this chapter's provisions in a court of competent jurisdiction.**

Section 5. That Section 100.05, Prohibited Acts, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.05. Prohibited Acts.

No charitable organization subject to the provisions of this chapter, or no agent, employee, or officer of any such organization, shall engage in any of the following prohibited acts:

1. (a) willful use of any solicited funds or soliciting or retaining funds to support or execute any conduct that is criminal or illegal under the laws of the City of Clearwater, Pinellas County, the State of Florida, or the United States;

(b) wilful failure to file a **registration** *any* statement **pursuant** to *required by* this chapter or knowingly making false statements or providing false information **with respect to any information or docu-**

**ments provided under the registration requirements of this chapter** *in those statements;*

(c) use of any scheme or artifice to defraud or obtain money or property by means of any false statement or representation;

(d) **falsely** *wilfully* concealing the identity of an organization on whose behalf solicitations are being made;

(e) **falsely representing** *knowingly misrepresenting* that any **contributions** *the proceeds of any solicitation of funds,* under current law, would entitle the donor to a Federal or State income tax deduction;

(f) **falsely** promising any person that a **contribution** *the proceeds of a solicitation of funds* will be refunded upon request, and thereafter *willfully* failing within 60 days to make a refund that has been requested in writing and **within a reasonable period of time;**

(g) promising any person that refunds of **contributions** *the proceeds of any solicitation of funds* will be made upon request without providing such person, at the time such representation is made, with a written statement of the terms and conditions upon which refunds are made; provided, however, that any statement made in good faith at the time is not prohibited by this section.

(h) soliciting *funds* at private residences between 11:00 P.M. and 6:00 A.M.;

(i) solicitation *of funds* by any person on behalf of a charitable organization which has failed to register *obtain a Certificate of Registration* under this chapter and is not exempt under Section 100.02;

(j) wilful failure to **file the records with the City Clerk under this chapter** *maintain the records or documents required by Section 100.05.*

*(k) if claiming an exemption under Section 100.02 (3), wilful failure to maintain the records or documents required to be maintained by said Section, wilful failure to make the private statement and those records or documents reasonably available for inspection by every member of the charitable organization, or knowingly making false statements or providing false information in the private statement or those records or documents described in said Section.*

2. In addition to any other remedy provided by law, any person who wilfully and knowingly commits any of the prohibited acts under this section shall be punishable by a fine not to exceed one thousand dollars ($1,000.00) or a term of incarceration not to exceed six (6) months, or both.

3. This chapter is not intended to repeal or affect other fraud and consumer protection laws of the City of Clearwater, Pinellas County, the State of Florida, or the United States.

Section 6. That Section 100.06, Power of the City Attorney to Investigate and Prosecute Prohibited Acts of Charitable Organizations, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or reletterd where necessary to read as follows:

Section 100.06. Power of the City Attorney to Investigate and Prosecute Prohibited Acts of Charitable Organizations.

1. The City Attorney **may** *shall* investigate **the solicitation of funds by charitable organizations** *alleged violations of this chapter* only after ten individuals file separate bona fide complaints in writing, sworn to, or affirmed, with the City Attorney, setting forth facts demonstrating that one or more

of the prohibited acts set forth in Section 100.05 have been engaged in by the charitable organization and that the complaining party has been injured by such act or acts.

2. **For purposes of investigating complaints under this section, the City Attorney shall have the power to apply to a court of competent jurisdiction for a subpoena or subpoena duces tecum to bring before him or her any person and to require as part of such subpoena the production of relevant documents and records and to administer oaths and take depositions of any such person so subpoenaed. The City Attorney shall have the power to effect service of process of subpoenas, after approval of such subponea by a court of competent jurisdiction. The wilful failure of a person without lawful excuse to obey a subpoena or subpoena duces tecum shall constitute a prohibited act under this chapter. This provision does not preempt or supersede any other general laws concerning a refusal to obey a valid subponea.** *The City Attorney, when conducting an investigation pursuant to subparagraph 1 shall have the power to subpoena any person, require the production of the records or documents described in Section 100.04 and the private statement and records or documents described in Section 100.02(3), and administer oaths.*

**3. In investigating citizen complaints about a charitable organization's solicitation of funds, the City Attorney shall have access to the public records filed by the organization with the City Clerk.**

**4** *3.* **The City Attorney may commence and maintain in a court of competent jurisdiction all proper and necessary actions and proceedings to prosecute any act prohibited by this chapter.** *If the investigation conducted under subparagraph 1 demonstrates that probable cause exists to believe that*

*a violation or violations under Section 100.05 exist, then the City Attorney shall institute an action to prosecute such violation or violations.*

Section 7. That Section 100.07, Damages to Injured Persons, of Chapter 100. Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.07. Damages to Injured Persons.

1. Nothing herein contained shall preclude any person aggrieved by a prohibited act under Section 100.05 **performed** *committed* by a charitable organization from commencing an appropriate action or proceeding **in the Circuit Court** under the laws of the State of Florida to recover compensatory damages.

Section 8. That Section 100.08, Notice to the Public About the Provisions of this Chapter, of Chapter 100, Solicitation of Funds for Charitable Purposes, of Title VIII, Public Health and Safety, of the Code of Ordinances, City of Clearwater, be and the same is hereby amended and renumbered or relettered where necessary to read as follows:

Section 100.08. Notice to the Public About the Provisions of this Chapter.

The City Attorney shall be empowered to inform the public about the requirements of this chapter as applied to all charitable organizations soliciting funds in Clearwater, Florida. The City Attorney specifically has the authority to notify the public that the office is authorized to receive and investigate complaints relating to the violations of this chapter. The City Attorney shall give public notice of all convictions of *charitable* organizations violating the provisions of this chapter and the basis of these convictions.

Section 9. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 10. Should any part or provision of this ordinance be declared by a court of competent jurisdiction to be invalid, the same shall not effect the validity of the ordinance as a whole, or any part thereof, other than the part declared to be invalid.

Section 11. This ordinance is adopted as an emergency ordinance, pursuant to Section 166.041(3)(b), Florida Statutes, and the Clearwater City Charter.

Section 12. The City of Clearwater hereby exempts itself from the provisions of Pinellas County Ordinance No. 82-38, and such ordinance shall not apply within the corporate limits of the City of Clearwater, Florida.

Section 13. It is hereby found, determined and declared that this ordinance is necessary and urgently needed for the preservation of the welfare of the citizens and inhabitants of the City of Clearwater, Florida, in that passage of this ordinance is needed to further narrow and refine the provisions of Chapter 100 of the Clearwater Code of Ordinances, which chapter is presently the subject of pending litigation and should therefore be addressed prior to the termination of such proceedings before the trial court, thereby preserving the existing public and compelling interest which calls for the creation of the chapter, and by reason of such fact, an emergency is hereby declared; and this ordinance shall be in full force and effect immediately upon its passage. This ordinance shall automatically expire ninety (90) days from the date of its passage unless the ordinance is submitted during such time for consideration as a non-emergency ordinance.

PASSED ON FIRST FIRST READING March 15, 1984

PASSED ON SECOND AND FINAL READING AND ADOPTED AS AMENDED March 15, 1984

/s/ Kathleen F. Kelly
Mayor-Commissioner

Attest:

/s/ Lucille Williams
City Clerk

**[Excerpts from Preliminary Report to the Clearwater City Commission Re: The Power of a Municipality to Regulate Organizations Claiming Tax Exempt or Non-Profit Status]**

* * * *

. . . Accordingly, they conceived a plan to silence public discussion of Scientology and to force defectors into remaining silent about their experiences. This plan included aggressive criminal action, including extortion through use of confidential "auditing information" which is described elsewhere in this Report. The plan also involved resort to the courts. Hubbard realized that many people cannot afford the financial burden of defending themselves in litigation. As his own financial resources grew, he was able to afford lawyers in cities all over the world to do his bidding. He launched a campaign of legal terrorism against all who dared to say anything about Scientology. His own writings set forth this policy very clearly. At one point he wrote:

> "The purpose of a lawsuit is to harass and discourage rather than to win."

At another point Hubbard wrote:

> "Don't ever defend. Always attack. Find or manufacture enough threat against them to cause them to sue for peace. Originate a black PR campaign to destroy the person's repute and to discredit them so thoroughly they will be ostracized. Be alert to sue for slander at the slightest chance so as to discourage the public presses from mentioning Scientology."

In one of his books, Hubbard gives even more explicit instructions about how lawsuits should be filed against people *even against the advice of counsel.* He wrote:

> "The law can be used very easily to harass, and enough harassment on somebody who is simply on the thin edge anyway, well knowing that he is not authorized, will generally be sufficient to cause his

professional decease. If possible, of course, ruin him utterly. . . . ."

"Should you ever be arrested for practising Scientology, treating people, make very sure, long before the time comes, that you have never used drugs or surgery, and that you have never prescribed a diet, or vitamins, and when that time might come, make very sure that you immediately and instantly, within two or three hours after your receipt of the warrant, have signed upon the server of that warrant, a personal civil suit for $100,000.00 damages for having caused the arrest of a Man of God going about his business in his proper profession, and for having brought about embarrassing publicity and molestation. . . ." "*And if you are foolish enough to have an attorney who tells you not to sue, immediately dismiss him and get an attorney who will sue.* Or, if no attorney will sue, simply have an HASI suit form filled out and present yourself to the court clerk in the court of the area in which your case has come up. . ." (Emphasis supplied).

Pursuant to these policies, which are carried out by Guardians' Office "Legal Officers", at each local org, Scientology organizations have, over the years, filed hundreds of lawsuits against private citizens and organizations. Most of them are absurdly frivolous. Most have been dismissed. Generally, the Scientologists have won cases only where they have so exhausted their victims' resources that the victims were unable to defend themselves. For example, in many instances the Scientologists have sued the same person or publisher simultaneously in many different states and countries, making it impossible for the person to defend himself. . . .

No. 93-1603

Supreme Court, U.S.
FILED
JUL 11 1994
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF CLEARWATER, FLORIDA, *et al.*,

*Petitioners,*

—v.—

CHURCH OF SCIENTOLOGY FLAG SERVICE ORGANIZATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Date: July 11, 1994

## RULE 29.1 STATEMENT

Respondent Church of Scientology Flag Service Organization, Inc. has no parent companies or subsidiaries to list pursuant to Rule 29.1 of the Rules of the Supreme Court.

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Church of Scientology Flag Service Organization (the "Church") files this brief in opposition to the petition of the City of Clearwater and several City officials (collectively the "City") for a writ of certiorari. The opinion of the court of appeals is consistent with the decisions of this Court and of other circuits, and with the statute and legislative history. The City's petition presents no conflict among the circuits or with the decisions of this Court, and no new issue of law; it is merely an attempt to relitigate facts that already are clearly established in the record. Because, as the court of appeals held, the facts sufficiently establish the Church's entitlement to attorneys' fees, certiorari should be denied.

## OPINIONS BELOW

The petition fails to mention or append the unreported decision of the district court, dated March 28, 1984, holding Clearwater Ordinance 3091-83 (the "1983 ordinance") unconstitutional (A-1).[1] The earlier decision of the United States Court of Appeals for the Eleventh Circuit, dated November 13, 1985, vacating the district court's decision of March 28, 1984 as moot, is reported at 777 F.2d 598.

## STATEMENT

### Proceedings Below

1. On October 6, 1983, the City enacted the 1983 ordinance (R1-1-29). The ordinance regulated charitable solicitations, even by churches and even on their own property, gave broad investigative powers to City officials, and imposed extensive recordkeeping and disclosure requirements. The 1983 ordinance exempted organizations that solicit from "members," defined as "any person regularly attending or participating in a charitable organization." Section 100.01(5). To be eligible for

[1] We have appended the missing decision. References to "A-___" are to pages in the appendix to this Brief in Opposition. References to "___a" are to pages in the appendix to the petition. Record references are made to the record in the court of appeals as follows: "R[volume]-[document number]-[page]," unless otherwise noted.

exemption, the 1983 ordinance required organizations, including churches, to record and disclose the names of members.

The 1983 ordinance required churches and charitable groups to obtain a city permit to solicit funds, imposed criminal and civil penalties for solicitation without a permit, and authorized post–denial judicial review of a decision denying a permit application. It also established a series of prohibited acts, for which criminal penalties were provided, and granted discretion to the City Attorney to investigate a charitable organization upon receipt of ten citizen complaints.

2. On January 23, 1984, the Church commenced this action to enjoin enforcement of the 1983 ordinance. The Church alleged that the ordinance violated the First Amendment religion clauses in a variety of ways, including, *inter alia*, (1) that it was enacted for an invidious sectarian purpose, to subject the Church to discriminatory regulation and to drive it from Clearwater; (2) that it improperly required churches and other organizations to disclose all their financial records and thus all their activities on a continuing basis; (3) that the permit requirement effected a prior restraint on speech, including religious speech, by forbidding churches to solicit funds even on their premises without first obtaining a permit; and (4) that it vested broad enforcement discretion in City officials without sufficient standards to cabin their actions. Finally, and most prominently, the Church alleged that the limited membership exemption effected a facial sectarian discrimination or denominational preference by extending the exemption only to those denominations whose members "regularly attend" services at which donations are solicited; churches, such as the Church of Scientology (and probably no other church in Clearwater) which provide religious services on an individual basis to members on an irregular or episodic schedule could not qualify for the exemption.

The Church moved for injunctive relief, placing particular emphasis on the discriminatory and intrusive nature of the membership exemption and on the broad discretion of the City Attorney to carry out a prior restraint against solicitation. Indeed, the Church characterized the membership definition as the "most important" facially discriminatory feature of the 1983 ordinance (R1-17-6) and decried the utter lack of stan-

dards to govern the actions of the City Attorney (R1-17-28 to 31).[2]

3. Six days after the oral argument, on March 15, 1984, the City repealed the 1983 ordinance and enacted Ordinance No. 3479-84 (the "1984 ordinance"), an amended version of the 1983 ordinance. While the 1984 ordinance contained numerous constitutional infirmities (as held by the court of appeals in a decision which is the subject of the petition in No. 93-1604), it did eliminate or ameliorate four of the critical defects raised by the Church. First, it eliminated the limited membership exemption, which facially discriminated against the Church. Second, it corrected the prior restraint of the 1983 ordinance by providing that an organization could continue to engage in solicitation even if it were denied a permit, unless and until the city obtained a court order enforcing its denial of a permit. Third, it restricted the unbridled discretion of the City Attorney, thereby making it more difficult for him to single out the Church for harsh enforcement. Fourth, it corrected certain of the vague provisions of the ordinance.

The City announced the change in a post-hearing memorandum submitted to the district court on March 16, 1984, in which the City conceded the unconstitutionality of the 1983 ordinance—a fact the City omits to mention anywhere in its present Petition. The City explained the repeal of the 1983 ordinance in terms substantially at variance with the City's current explanation:

> [The City] amended the subject ordinance in response to many of the objections asserted by the plaintiffs in their complaints and their pretrial memoranda of law. City recognizes a responsibility to draft the ordinance narrowly to achieve its purpose, and the City believes that the amended ordinance better satisfies this requirement.

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[2] Thus, petitioners' argument (Pet. at 12-14) that the Church, in its brief to the Eleventh Circuit, mischaracterized its initial constitutional attack on the 1983 ordinance—indeed, that it engaged in a "remarkable *volte face*" (*id.* at 13)—is false. While the Church indeed did complain about the intrusive and entangling nature of the 1983 ordinance, its focus was the very features of the ordinance that the City amended, in the face of that attack. *See* text, *post*.

(R1-20-2). The City's counsel repeated this concession in a status conference on March 23, 1984:

> Well, Your Honor, you know we passed an ordinance that these plaintiffs didn't like and they told us and they told the Court why they didn't like it. . . . Okay, and we took a look at why they didn't like it and we said, well, maybe they have got some valid objections to it, both in terms of how the Court might react to it and in terms of how the City legislatively would want to react to the objections we consider to be valid, we retrofied. . . . In other words, they wanted the Court to strike down those provisions. We have given them what they asked for. . . . [W]e felt we were doing the plaintiffs a favor and was not inconveniencing the Court by yielding to their objections and by adopting a new and different Ordinance to which, apparently and hopefully, they will have no objections.

(R2-46-3 to 4).

4. Shortly after the repeal of the 1983 ordinance, the district court held that the 1983 ordinance was unconstitutional on its face (A-1). With respect to the limited membership exemption, the district court stated that the 1983 ordinance:

> exempts those churches which limit their solicitations to those who regularly attend or participate in religious services (Section 100.01(5)). Churches which obtain contributions from members who participate in church services on a non–regular or episodic basis, as well as churches which do not offer, encourage, or require regular attendance or regular participation of their members are *not* exempt. Thus, a stable church membership requiring regular attendance need not be affected by this ordinance; however, a church whose membership is growing and actively engaged in proselytizing and fund raising falls under the regulatory scheme of the ordinance.

(A-16, A-17). The court found:

> There is absolutely no showing of any compelling state interest being furthered by the parameters of the limited membership exemption of this ordinance. This ordinance

> not only implies a religious preference, its mere presence could foster a stagnation of religious practice in Clearwater by impacting on growing congregations and forestalling larger, more organized churches from continuing to seek new members as well.

(A-17, A-18).

The district court also specifically addressed the issue of prior restraint, and the constitutional imperative to have adequate judicial review procedures available "to insure that decisions made by administrators do not effectively forestall First Amendment activities which should be allowed" (A-14). And, directing its attention to the discretionary powers to investigate possible violations and enforce the ordinance, the district court found these provisions constitutionally defective as well:

> The enforcement provisions of the ordinance do not contain articulated standards indicating when the City Attorney should or will investigate an organization against which ten complaints have been filed. This vagueness in determining when the City Attorney will conduct an investigation when ten complaints have been filed against an organization creates an opportunity for arbitrary and subjective enforcement of a law infringing on constitutional rights, and accordingly, is unconstitutional.

(A-20).

On appeal, the United States Court of Appeals for the Eleventh Circuit vacated the district court's ruling as moot, since at the time it was entered the City had repealed the challenged 1983 ordinance by enactment of the 1984 ordinance. The court of appeals further found that there was no possibility that the repealed 1983 ordinance would regain vitality. *Church of Scientology Flag Service Org., Inc.* v. *City of Clearwater*, 777 F.2d 598, 605 & n.21 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986).[3]

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[3] The court of appeals' decision vacating the district court's decision as to the 1983 ordinance as moot was, in turn, effectively overruled by this Court's decision in *Northwestern Florida Chapter of Assoc. Gen'l Contractors* v. *City of Jacksonville*, ___ U.S. ___, 113 S. Ct. 2297, 2301

5. The Church then filed a petition for attorneys' fees under 42 U.S.C. § 1988. The Church contended that the elimination of the limited membership exemption, which had exempted virtually all other organized religions except the Church of Scientology, the correction of the prior restraint aspects of the 1983 ordinance, and the modification of the provision that had given the City unbridled discretion in initiating investigation and prosecution, made it the prevailing party on significant issues in the case (R5-108, R-109, R-117).

The district court denied the petition on the basis that the Church was not the prevailing party. The district court based this finding in part on the fact that the court of appeals had found the district court's decision invalidating the ordinance to be moot when entered (18a, 20a-21a).[4] It also focused on what it termed the "similarity" between the Church's legal arguments against the new and different provision in the 1984 ordinance requiring disclosure to members of financial information, and the argument the Church had made against the now-repealed limited membership exception (30a). Quoting a mischaracterization of the Church's argument *by the City*, the district court incorrectly suggested that the Church had contended "that in dispositive respects the new Ordinance was the same or even worse than the old one" (23a).[5] Notwithstanding the fact that

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(1993). *See Church of Scientology Flag Services Org.* v. *City of Clearwater*, 2 F.3d 1514, 1520 (11th Cir. 1993).

[4] The district court's reliance on the court of appeal's vacation of the district court's earlier order as moot was contrary to well-established law that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980). It is enough that the plaintiff is the "catalyst" for remedial modification of the state actions challenged. *Fields* v. *City of Tarpon Springs*, 721 F.2d 318, 321 (11th Cir. 1983); *Taylor* v. *City of Fort Lauderdale*, 810 F.2d 1551, 1560 (11th Cir. 1987). Petitioners, in apparent recognition of the catalyst theory, made no attempt in the court of appeals to justify the district court's decision denying fees on the grounds of the mootness decision, and have not sought certiorari on that basis.

[5] The quoted passage is *not* the Church's statement at all, but, rather, was a mischaracterization of the Church's argument *by the City*. The City continues to mischaracterize and misquote the Church's argument in this Court (Pet. at 2).

the district court formerly had declared the 1983 ordinance facially invalid on the basis of the very defects that the City remedied by amending the ordinance, the court now concluded that the elimination of the limited membership exemption and the limitation of the City Attorney's broad investigative and prosecutorial discretion were legally insignificant.

6. The court of appeals reversed and remanded for determination of the fee award. It held that the Church was the prevailing party because it had caused the City to amend the 1983 ordinance to eliminate the constitutionally objectionable limited membership exemption, the prior restraint of solicitation, and the City Attorney's unfettered investigative and prosecutorial discretion (1a). It ruled that the Church had prevailed on "its asserted right not to be treated differently from other religious organizations" (6a). The court of appeals said that the "gravamen of [the Church's] challenge" was that the ordinance regulated "in a discriminatory manner that favors one religion over another" (*id.*); the Church's rights were "plainly vindicated by the repeal of the challenged limited membership exemption, an action which Clearwater conceded at the time was caused by Scientology's articulation of alleged constitutional infirmities" (7a). The court of appeals also found that the Church successfully had prevailed in its challenge to the ordinance's vagueness. It concluded that the Church materially had altered the legal relationship between itself and the City in a manner that conferred legal benefit on the Church (*id.*). It also rejected the district court's reasoning that the similarity in the grounds advanced in the challenges to the 1983 and 1984 ordinances disentitled the Church to a fee award: "Scientology did not fail when Clearwater ceased some of its challenged discriminatory conduct merely because the city persisted in other challenged conduct" (7a).

## Facts

Respondent is a church of the Scientology religion that provides religious training and services in Clearwater, Florida. The Internal Revenue Service has recognized respondent as a church, within the meaning of 26 U.S.C. § 170, exempt from

taxation under 26 U.S.C. § 501(c)(3). See Internal Revenue Service, *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986*, Publication 78 (rev. 2-94), Supp. No. 1994-1. All of its religious activities in the City of Clearwater are directed towards its members. It makes no attempt to solicit contributions from the public, but it does advertise and sell religious books and pamphlets about the religion of Scientology to the public (R1-1-2 to 3).[6]

Petitioner has made a series of highly inflammatory, misleading, false—and ultimately irrelevant—statements of "fact," which it is respondent's obligation to clarify. Rule 15.1, Rules of the Supreme Court; *see also* Rule 14.5.

Thus, petitioners' statement that respondent "solicits from the public in Clearwater" (Pet. at 6-7) is false, except to the extent that the Church sells religious books and pamphlets. Similarly, petitioners' statement that "Scientology's claim to religiosity is questionable" (*id.*) is absurd, given the IRS' recognition of the respondent as a tax-exempt church, and the opinions of both courts below.

Petitioners' characterization of the Church's "use of expensive, harassing litigation" is based upon Clearwater's own self-justifying reports and accounts, and is false. Its references to amounts allegedly spent on lawyers, blast-resistant vaults, and other matters appear nowhere in the record of this case, and are misleading in the extreme, as well as being irrelevant.

Petitioners' statement that the Church made "huge pretrial litigation expenditures" requiring the City "to bring the case to a head by a summary judgment motion" (Pet. at 12) is made of

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[6] Petitioners thus distort the record in arguing that "Scientology solicits from the public in Clearwater" (Pet. at 7), and in arguing that the Church's challenge to the limited membership exemption was based upon a theory that the City could not distinguish between a church's solicitations of its own members and a church's solicitations from the general public (*id.*). Rather, as set forth *ante*, the Church's challenge to the limited membership exemption of the 1983 ordinance was premised on the facial discrimination between kinds of church members, *i.e.*, those who regularly attend and participate in church services and those who do not. As noted, Scientology religious services are typically not congregational in nature, and do not occur on a "regular" basis, a fact well-known to the drafters of the 1983 ordinance.

whole cloth. The only proceedings in *this* case were the Church's motion for preliminary and permanent injunction, made at the very outset of the case, the City's appeal from the district court's order granting that motion, and the attorney's fee motion and appeal. Petitioners' references to "litigation a outrance" (Pet. at 12) are without basis.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. Petitioner Has Not Raised A Substantial Question Of Law Or Shown A Conflict Among the Circuits As To The Proper Standard To Be Applied In Determining Whether A Party Is A Prevailing Party Entitled To A Fee Award Under 42 U.S.C. § 1988.

#### A. Certiorari Is Not Appropriate To Review A Circuit Court's Application Of The Correct Legal Standards To The Facts And Circumstances Of A Particular Case

The legal standards governing the award of attorney fees to a prevailing party in cases arising under 42 U.S.C. § 1983 are well-settled. *Texas State Teachers Ass'n* v. *Garland Independent School District, 489 U.S. 782, 789 (1989); Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983). Indeed, petitioners have raised no question about the standard applicable to determination of whether a party has prevailed within the meaning of the statute. Nor do petitioners argue that the court of appeals articulated an improper legal standard at variance with that established by this Court or applied by the other circuits. The only question petitioners raise is whether the court of appeals properly applied the agreed upon legal standard to the facts and circumstances of this case.

While we submit, and show below, that the court of appeals unquestionably reached the correct result in holding that the Church was the prevailing party and is entitled to some fee award, whether it did or did not is not an appropriate subject for review by this Court. The purpose of certiorari is not to review the various and sundry decisions of the courts of appeals to determine whether they correctly weighed the record

in each case; rather, it is to ensure that they apply the correct legal principles on questions of substantial importance, and to resolve conflicts among the circuits on substantial legal issues. Rule 10.1, Rules of the Supreme Court. *E.g.*, *Ross* v. *Moffitt*, 417 U.S. 600, 616-17 (1974) (Rehnquist, J.) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"); *cf.*, *McElroy* v. *United States*, 455 U.S. 642, 643 (1982) (O'Connor, J.) (certiorari granted due to "a conflict among the Circuits on this issue of statutory construction"); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 (1981) (Marshall, J.) (certiorari granted "to resolve a conflict among the Circuits"); *Marks* v. *United States*, 430 U.S. 188, 189 (1977) (Powell, J.) (certiorari granted "to resolve a conflict in the Circuits"). If the courts of appeals articulate and apply the correct legal standard, as the court of appeals indisputably did in this case, then there can be no reason for this Court to undertake review, at least absent an extraordinary misapplication of the legal standard the effect of which is virtually to create a new legal standard at variance with established law. *See*, *e.g.*, *Texas* v. *Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.); *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923) (Taft, C.J.) (certiorari jurisdiction "was not conferred on this Court merely to give the defeated party in the Circuit Court of Appeals another hearing"); *cf.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.) ("We do not grant a certiorari to review evidence and discuss specific facts"). No such showing has been or could be made here.

The above principles apply with special force in the context of this case. Applications for attorneys' fees in civil rights and other litigation are fairly common. Litigation over such questions in effect amounts to litigation about the prior litigation. The docket of the Court would soon be swamped if the Court were to consider, let along undertake to review, whether the lower federal courts correctly applied the undisputed legal standards to the facts and circumstances of each case. The petition should be denied.

### B. The Court Of Appeals Applied The Proper Legal Standard And Correctly Found That The Church Was A Prevailing Party And Was Entitled To A Fee Award of Some Kind

The Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, 90 Stat. 2641, provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.[7]

The threshold question in the determination of whether a litigant is entitled to attorneys' fees under § 1988 is whether the applicant is the prevailing party. As the Court unanimously has held, the test is whether plaintiffs "succeed on any significant issue in the litigation which achieves some of the benefit [that they] sought in bringing the suit." *Texas State Teachers Ass'n*, 489 U.S. at 789 (*quoting Hensley*, 461 U.S. at 433). What is required is that the party requesting fees be able to show "some benefit," in other words, the plaintiff "at a minimum . . . must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas Teachers Ass'n*, 489 U.S. at 792 (*citing Rhodes* v. *Stewart*, 488 U.S. 1, 3-4 (1988); *Hewitt* v. *Helms*, 482 U.S. 755, 760-61 (1987)). Where the plaintiff has met this minimal success, it "has crossed the threshold to a fee award of some kind." *Texas State Teachers*, 489 U.S. at 792.

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[7] The quoted passage contains the relevant language of the statute in force when the Church made its attorneys' fee request. Subsequently, in 1991, Congress recast the existing portions of § 1988 into subsections (a), (b), and (c), with the effect that subsection (b) now contains the attorney's fee provision. Pub. L. 102-166, § 113(a). It also added authorization for attorneys' fees under 42 U.S.C. § 1981a to the list of actions in the new subsection (b). Id. § 103. In 1993, proceedings under the Religious Freedom Restoration Act were added to the list in subsection (b). Pub. L. 103-141, § 4(a), 107 Stat. 1488.

A plaintiff is deemed a prevailing party and ordinarily is entitled to "some kind" of attorneys' fees award if the plaintiff has succeeded on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Hensley*, 461 U.S. at 433. In the Court's words, it is sufficient for the plaintiff to "be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers*, 489 U.S. at 792-93.

There can be no question but that the court of appeals explicitly applied the standard of *Hensley* and *Texas State Teachers* in holding that the Church was a prevailing party in this litigation (5a-7a). Petitioners do not claim to the contrary.

Moreover, the court of appeals was indubitably correct in reaching its conclusion. It cannot be controverted that the City repealed the 1983 ordinance in the face of the Church's legal challenge to its constitutionality. As discussed above, the City acknowledged in writing that the amendments were made "in response to many of the objections asserted by the plaintiffs in their pretrial memoranda of law" and in recognition of the City's "responsibility to draft the ordinance narrowly to achieve its purpose" (R1-20-2). A week after the repeal, the City's counsel explained to the district court why it changed the ordinance after litigation: "[W]e took a look at why [the Church] didn't like it and we said, well, maybe they have got some valid objections to it . . . . In other words, they wanted the Court to strike down those provisions. We have given them what they asked for" (R2-46-3 to 4).

In the present Petition, the City seems to have forgotten what it told the district court. The City allows only that it had "amended certain provisions of the law" in order "to accommodate points made by Scientology" in the litigation (Pet. at 6).[8] But even this concession demonstrates lack of dispute over

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[8] The City further claims that it "accommodated" the Church "just as the City accommodated other groups in other ways when doing so would not harm the law's ability to accomplish its purposes" (Pet. at 7). This ignores the obvious difference between the Church and "other

the fact that the limited membership exemption was eliminated, the prior restraint of all solicitation without a permit was abolished, the unbridled discretion of the City Attorney to investigate and prosecute was limited, and other corrective changes were made in the ordinance, all in response to the Church's lawsuit. Moreover, the provisions that the City eliminated were precisely those that the Church claimed had unconstitutionally singled out Scientology for worse treatment than other organized religions in Clearwater. As the court of appeals noted in an earlier appeal of this case, the City's amendment "ma[de] substantial modification to Ordinance No. 3091-83." *Church of Scientology Flag Service Org. Inc.* v. *City of Clearwater*, 777 F.2d 598, 601 (11th Cir. 1985).

By eliminating the limited membership exemption, and making the ordinance more applicable to all religious and charitable organizations operating in Clearwater, the Church achieved a significant victory that is neither technical nor *de minimis*, but is at the heart of the First Amendment. No principle is more well-established under the religion clauses of the First Amendment than that the state may not "pass laws which aid one religion" or that "prefer one religion over another." *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947); *see also Larson* v. *Valente*, 456 U.S. 228, 244 (1982); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

*Larson* is particularly instructive. In that case, the Court reviewed a solicitation ordinance containing a membership exemption which had the effect of imposing regulatory authority upon smaller and less well-established churches, exempting the more established churches. The Court found that the ordinance "impose[s] the registration and reporting requirements . . . on some religious organizations but not on others" and "does not operate even-handedly," 456 U.S. at 253, thereby "set[ting] up" a type of "official denominational preference," *id.* at 255. The Court struck down the ordinance, stating that

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groups"—the others were "accommodated" before enactment of the ordinance, since the ordinance was designed to regulate the Church of Scientology. The City's so-called "accommodation" of the Church did not take place until after the filing of a lawsuit, and the briefing and argument of the issue of the ordinance's validity.

the "constitutional prohibition of denominational preference is inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* at 245. Such laws, in the Court's words, " 'engender a risk of politicizing religion'—a risk, indeed, that has already been substantially realized." *Id.* at 253 (*quoting Walz* v. *Tax Commission*, 397 U.S. 664 (1970)). The Court found that the burden of complying with the charitable solicitation ordinance "is certainly not *de minimis*." 456 U.S. at 253. Thus, the elimination of a similar provision in the present case, catalyzed by the Church's lawsuit, must also be viewed as a significant legal victory. Not only did the Church void an invidious "badge of second-class citizenship" inherent in any such discriminatory scheme, *Daniel* v. *Paul*, 395 U.S. 298, 308 (1969) (Douglas, J., concurring), which "engender[ed] a risk of politicizing religion," *Larson*, 456 U.S. at 253, but it also eliminated a facial basis upon which enforcement officials could seek to justify harsher enforcement action against the Church than against other traditional churches. No longer could the City Attorney support investigations of the Church's solicitations of its members, but not of the local Catholic, Baptist, or Presbyterian Church, on the grounds of the statute itself.

The elimination of the prior restraint provisions of the ordinance was also of fundamental significance. Prior restraints are the most highly disfavored tools of government regulation of speech. *E.g.*, *National Socialist Party* v. *Skokie*, 432 U.S. 43, 44 (1977) (*per curiam*); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 561 (1976); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Freedman* v. *Maryland*, 380 U.S. 51, 57 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963); *Staub* v. *Baxley*, 355 U.S. 313, 325 (1958); *Kunz* v. *New York*, 340 U.S. 290, 294 (1948); *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940); *Near* v. *Minnesota*, 283 U.S. 697, 713-20 (1931). Under the 1983 ordinance, a church or other organization was forbidden to engage in solicitation of any kind unless and until it obtained a permit to do so. If a permit were administratively denied, the organization would be prohibited from solicitation unless and until it obtained judicial relief from the city clerk's permit denial (R1-1-45 to 46). Under the amended 1984 ordinance, solicitation may continue without a permit unless and

until the permit is denied *and* the City obtains a court order upholding the denial. The Church thus obtained a critical and fundamental modification in the ordinance.

Similarly, the imposition of limits on the City Attorney's formerly unbridled investigative and prosecutorial powers also was a significant legal victory. Explicit legal standards which limit state discretion are an indispensable deterrent to religious discrimination. *E.g.*, *Cantwell*, 310 U.S. at 307 ("[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license the grant of which rests in the exercise of a determination by a state authority . . . is to lay a forbidden burden upon the exercise of liberty protected by the constitution").

Where litigation has forced an adversary to make concessions favorable to the plaintiff, that plaintiff has prevailed for purposes of the § 1988 fee award. When § 1988 was enacted, Congress expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief." S. Rep. No. 1011, 94th Cong., 2d Sess., at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912. As the Court has observed, "Nothing in the language of § 1988 conditions the . . . power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980).

The City cannot find support in the fact that the district court's finding of the 1983 ordinance's unconstitutionality had been vacated as moot. The court of appeals vacated that finding only because of the City's repeal of the ordinance—and the City, in turn, repealed the ordinance "in response to many of the objections asserted by the plaintiffs in their complaints and pretrial memoranda of law" (R1-20-2). In short, the court of appeals' finding of formal mootness resulted from the City's concession of the validity of many of the Church's contentions, and from the repeal of significant portions of the ordinance that the Church claimed were constitutionally objectionable.

Nor is one any less a prevailing party because success was secured on some claims and legal theories advanced, but not all. The degree of success is an issue in determining the *amount*

of the attorneys' fees to be awarded, *e.g.*, *Texas Teachers Ass'n*, 489 U.S. 782; *Hensley*, 461 U.S. 424, not *whether* attorneys' fees should be awarded in the first place. As the Court repeatedly has noted, complex civil rights litigation typically grows out of a common core of facts involving many different legal theories. A party prevails when there is success on a significant issue; typically, all theories and issues do not get decided in a party's favor—if only because some issues do not get decided at all. *E.g.*, *Texas Teachers Ass'n*, 489 U.S. at 789; *Hensley*, 461 U.S. at 435-36. It is "clear that the fact that a plaintiff has prevailed on one of two or more alternative bases for relief does not prevent an award of attorneys' fees for the unaddressed claims, as long as those claims are reasonably related to the plaintiff's ultimate success." *Smith* v. *Robinson*, 468 U.S. 992, 1007 n.10 (1984). All that is required is that "a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Texas State Teachers*, 489 U.S. at 792 (*quoting Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987)). In no circumstances can the prevailing party be penalized for failing to achieve a perfect score.

Nor does the pendency of related litigation attacking other aspects of the City of Clearwater's efforts to regulate the activities of the Church of Scientology—including the Church's challenge to what it claims are constitutional defects in the ordinance *after* the amendments spurred by the Church's initiation of the present suit—remove the Church's entitlement for the relief it has obtained so far. The relevant inquiry is the relief obtained, not the claims advanced in subsequent litigation. The law is clear that attorneys' fees are warranted under § 1988 at the point when a party has established entitlement to relief; the award of interim attorneys' fees in a civil rights case is entirely appropriate even when the same case is still underway. *E.g.*, *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980). The case for the receipt of attorneys' fees while related or collateral litigation is pending is at least as strong.

In sum, although the City now quarrels over the extent of the benefits that the Church enjoyed due to these litigation–motivated "amendments" to the 1983 ordinance, it does not, and cannot, contest that it eliminated from the 1983 ordinance pro-

visions respecting the limited membership exemption, the prior restraint of religious speech, and the discretion of the City Attorney to investigate, issues over which the Church had gone to court, in response to the Church's litigation. Pet. at 6-7.[9] As the court of appeals correctly held, these successes "are neither technical nor *de minimis*" (6a). These were significant victories both for the Church and for the Constitution, rendering the Church a prevailing party under § 1988.

## II. Section 1988 Makes Attorneys' Fees Awards Available to Prevailing Parties Regardless Of Their Financial Condition Or Need.

The City also seeks certiorari on the question whether § 1988 should be construed to award fees only to successful litigants who are "non-wealthy" or "impecunious." The City can point to no conflict in the circuits or with this Court on the question; indeed, the case law uniformly rejects the City's position. Moreover, an examination of the statute's language, its

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[9] The City also casts aspersions on the manner in which the Church has litigated this case, hyperbolically analogizing the present lawsuit to the Allies' assault on the Normandy coast and repeatedly making shrill references to so-called Church "gospel" to litigate "a outrance." *E.g.*, Pet. at 6, 10, 12, 24. It speaks in feverish terms of the Church's "goal" being to "decimate the law." Pet. at 12. Bled of the venom, these assertions say little more than that the case was litigated zealously. The City's reference to litigation in other states, at other times, involving other parties, to support the notion that the Church's supposed character defects somehow render it undeserving of attorneys' fees, is also irrelevant. As a matter of law, even if every bit of this rhetoric were absolutely true, such conduct would not constitute "special circumstances" rendering an award of counsel fees unjust. *See, e.g., Williams* v. *Tri-County Growers, Inc.*, 747 F.2d 121, 138 n.38 (3d Cir. 1984) (attorney's misconduct not a special circumstance justifying reduction of attorney's fees); *Hall* v. *Hall*, 738 F.2d 718 (6th Cir. 1984) (plaintiff's misconduct not a special circumstance); *Mendoza* v. *Blum*, 560 F. Supp. 284, 288 n.3 (S.D.N.Y. 1983) (failure to appear for deposition not a special circumstance). Here, however, notwithstanding the petition's rancorous tone, the record is devoid of any supportable allegation or finding of misconduct. Quite simply, the Church litigated its challenge to the ordinance appropriately and vigorously, and brought it to an expeditious conclusion. The ordinance was repealed, and the case was effectively over within three months.

legislative history, and sound principles of statutory construction compels rejection of the City's argument. Congress intended that the Act encourage vigorous litigation in pursuit of important constitutional rights and federal policies, and that attorneys' fee awards should be available to all parties, regardless of identity or solvency.

### A. Certiorari Should Be Denied Because The Opinion Of The Court Of Appeals Is Consistent With The Decisions Of This Court And Of Every Circuit Court That Has Addressed The Issue

Petitioners do not even attempt to show that the opinion of the court of appeals conflicts with decisions of other circuits and of this Court. The reason for this failure is obvious: every court to have addressed the issue has found that § 1988 does not limit fee awards to only "impecunious" plaintiffs. Thus, in *Blanchard* v. *Bergeron*, 489 U.S. 87 (1989), the Court stated that "a plaintiff's recovery will not be reduced by what he must pay counsel. Plaintiffs who can afford to hire their own lawyers, as well as impecunious litigants, may take advantage of this provision [§ 1988]." *Id.* at 94.

At least seven circuits, some on several occasions, have held that a plaintiff's wealth or ability to pay for a lawyer is not bar to an award of fees under § 1988. *See, e.g., Milwe* v. *Cavuoto*, 653 F.2d 80, 83 (2d Cir. 1981); *Int'l Oceanic Enterprises* v. *Menton*, 614 F.2d 502, 503 (5th Cir. 1980); *Bunn* v. *Central Realty of Louisiana*, 592 F.2d 891, 892 (5th Cir. 1979); *Entertainment Concepts, Inc.* v. *Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); *McLean* v. *Arkansas Bd. of Educ.*, 723 F.2d 45 (8th Cir. 1983) (*per curiam*); *Ackerly Communications* v. *City of Salem*, 752 F.2d 1394, 1397 (9th Cir. 1985), *cert. denied*, 472 U.S. 1028 (1986); *Jones* v. *Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987); *Duncan* v. *Poythress*, 777 F.2d 1508, 1511 (11th Cir. 1985) (*en banc*) (*dicta*), *cert. denied*, 475 U.S. 1129 (1986); *Mitten* v. *Muscogee County School District*, 877 F.2d 932 (11th Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990). No circuit has held to the contrary.

Several other court of appeals panels, and of course this Court, have analogously held that the existence of a contingency fee arrangement likewise is no bar to the award of fees under § 1988. *Blanchard* v. *Bergeron*, 489 U.S. 87 (1989); *Hammer* v. *Rios*, 769 F.2d 1404, 1408 (9th Cir. 1985); *Cooper* v. *Singer*, 689 F.2d 929, 932 (10th Cir. 1982), *on rehearing*, 719 F.2d 1496 (10th Cir. 1983); *Martin* v. *Heckler*, 773 F.2d 1145, 1152 (11th Cir. 1985) (*en banc*).

The decision of the court of appeals thus is consistent with every pronouncement and holding in this Court and in the circuit courts. No conflict appears. Certiorari should be denied.

### B. Congress Did Not And Did Not Intend To Limit Fee Awards To "Impecunious" Parties

Section 1988 plainly directs the district court "in its discretion" to award the prevailing party "a reasonable attorney's fee." The court's discretion, however, is in fact quite constrained; a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Blanchard*, 489 U.S. at 89 n.1 (*quoting Hensley*, 461 U.S. at 429; *Newman* v. *Piggie Park Enterprises*, Inc., 390 U.S. 400, 402 (1968)). Nowhere in the language of the Attorneys Fees Act of 1976 is there any indication that the statute is intended to condition authorization of attorneys' fees awards upon the prevailing party's financial status or ability to afford or pay for counsel.

#### 1. If The Statute Were Intended To Award Fees Only To The Impecunious, It Would Have Said So

The City's invitation to engraft onto § 1988 terms which Congress did not enact would be entirely inappropriate. An examination of congressional enactments both before and after the 1976 Attorneys Fees Act leaves no doubt that, if Congress had intended to make § 1988 fee awards contingent on financial need, it would have so stated.

For example, less than a decade earlier, Congress enacted a fee-shifting provision as part of the Fair Housing Act of 1968 (Title VIII to the Civil Rights Act of 1968), which prohibited discrimination in housing. 42 U.S.C. §§ 3601 *et seq*. The Fair

Housing Act created a private right of action for enforcement. *See* 42 U.S.C.A. § 3612 (West 1977).[10]

Under Title VIII, Congress provided for the award of attorneys' fees—but explicitly conditioned the award on the prevailing party's inability otherwise to pay:

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1000 punitive damages, together with court costs and reasonable attorney fees in the case of prevailing plaintiff: *Provided, that the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.*

42 U.S.C.A. § 3612(c) (West 1977) (emphasis in last clause added). Clearly, Congress is capable of enacting fee-shifting legislation so that attorneys' fees are awarded only when the prevailing party is (in the City's words) "impecunious" or "non–wealthy," when it chooses to. Eight years before the enactment of § 1988, Congress did precisely that.

Furthermore, four years *after* the 1976 Attorneys Fees Act, Congress again enacted a fee-shifting statute that tied entitlement to attorneys' fees to the prevailing plaintiff's financial status. In the Equal Access to Justice Act of 1980 (the "EAJA"), Congress established detailed provisions explicitly stating that an individual prevailing party would *not* be entitled to fees and costs if his or her net worth is more than $1,000,000, nor would a corporation be able to recover fees if its assets totalled more than $5,000,000 and it employed more than 500 people. *See* 5 U.S.C. § 504(b)(1)(B); 28 U.S.C. § 2412(d)(2)(B).[11]

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[10] The private enforcement provision originally was codified at § 3612. As discussed below, subsequent recodification redesignated the relevant section as § 3613.

[11] In 1985, Congress raised the net-worth ceilings to $2,000,000 and $7,000,000, respectively. Pub. L. 99-80, §§ 1 & 2, 99 Stat. 183. It is also worth noting that Congress gave charitable and religious organizations a preferred position in the EAJA. The EAJA exempts from the $7,000,000 limitation all tax-exempt organizations under 26 U.S.C.

Thus, within twelve years, Congress enacted three significant statutes governing fee-shifting in cases that involve civil rights violations. The 1976 Act, which has *no* language making the award of attorneys' fees a matter of financial means, is bracketed historically by the other two congressional enactments, which specifically state that fee awards are contingent on the prevailing party's finances.[12] It is reasonable to infer from the presence of means tests in the 1968 and 1980 enactments, and from the absence of such language in the 1976 Act, that, had Congress intended to tie § 1988 fee awards to the plaintiff's financial circumstances, it would have done so, and, further, that if Congress did not attach such a stipulation to the language of § 1988, it is because it did not intend it to be there.

Any remaining doubt about this dissolves when one examines what Congress did to the Fair Housing Act's fee-shifting provision *after* the enactment of the 1976 Attorneys Fees Act. In 1988, Congress enacted the Fair Housing Amendments Act, Pub. L. 100-430. Congress eliminated the financial need test,

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§ 501(c)(3), and it now specifically brings under its coverage adjudications under the Religious Freedom Restoration Act of 1993. (Congress also amended § 1988 specifically to authorize attorneys' fees in proceedings under the Religious Freedom Restoration Act. *See* Pub. L. 103-141, § 4(a), 107 Stat. 1488.)

[12] Congress enacted the EAJA with the 1976 Attorneys Fees Act clearly in mind. Congress surveyed the standards governing the operation of fee-shifting statutes. It specifically referred to the civil rights fee-shifting provisions of § 1988, 42 U.S.C § 2000a-3 (Title II), 42 U.S.C. § 2000e-5(k) (Title VII), 18 U.S.C. § 2520 (Title III), 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act), and 42 U.S.C. § 1973l(e) (Voting Rights Act), and also the attorneys' fees sections of the Consumer Product Safety Act, *e.g.*, 15 U.S.C. §§ 2060(c) & (e), 2072(a), and 2073. Of the civil rights statutes, *only* Title VIII conditioned the award of attorneys' fees on the plaintiff's ability to afford legal assistance. See H.R. Rep. No. 1418, 96th Cong., 2d Sess., at 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4987. (The Consumer Product Safety Act did impose jurisdictional minima on the amount in controversy, but did not specifically peg the attorney's fee award to the plaintiff's financial status.) As discussed below, Congress later amended Title VIII specifically to remove its financial need test and bring it into line with other civil rights fee-shifting provisions.

and modelled the relevant amendment upon the language of § 1988, nearly verbatim:

> In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.

42 U.S.C. § 3613(c)(2). *Compare* § 1988.

The language of § 1988 was used to signal that attorneys' fees awards no longer depend on the plaintiff's finances. Congress explicitly said that one of the purposes in enacting the 1988 Fair Housing Amendments Act was to "bring[ ] attorney's fee language in Title VIII closer to the model used in other civil rights laws."[13] H.R. Rep. 711, 100th Cong., 2d Sess., at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2174. When Congress criticized the 1968 Fair Housing Act's restriction of awards to only those plaintiffs who could not afford to pay, it did so by contrasting the language of the old provision with the language of § 1988:

> Unlike other civil rights laws, attorneys fees [under Title VIII] are available to a prevailing plaintiff only if the plaintiff cannot afford to pay. *"Compare" Civil Rights Attorney's Fees Act, 42 U.S.C. 1988.*

H.R. Rep. No. 711 at 16 n.20, 1988 U.S.C.C.A.N. at 2177 n.20 (quotation marks in original; emphasis added). Congress explained that the abandonment of the needs test "[p]rovides a definition of a prevailing party to be used under [The Fair Housing] Act. The term makes clear that the same definition of prevailing party as is used in [§ 1988] is to be used in this Act." *Id.* at 23, 1988 U.S.C.C.A.N. at 2184.

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[13] As noted above in connection with Congress' consideration of other attorneys' fees statutes in 1980, the Fair Housing Act was the only civil rights-related fee-shifting provision to make the fee award contingent on the prevailing party's financial ability to pay counsel. See H.R. Rep. 1418 at 8, 1980 U.S.C.C.A.N. at 4986; *compare* 42 U.S.C.A. § 3612(c) (West 1977) *with* 42 U.S.C. § 1988; 42 U.S.C. § 2000a-3; 42 U.S.C. § 2000e-5(k); 18 U.S.C. § 2520; 5 U.S.C. § 552(a)(4)(E); 42 U.S.C. § 19731(e).

From this it is clear beyond peradventure that the language of § 1988 would have stipulated that attorneys' fees awards go only to the impecunious, if that was its intended purpose. Congress did not insert a financial means qualification into the language of § 1988 precisely because it did not intend § 1988 to have such a qualification.

### 2. To Construe § 1988 As Imposing A Requirement Of "Impecuniousness" Would Pose Serious And Difficult Questions Of Line-Drawing Best Left To Congress, Would Expand Litigation Over Fees To An Unmanageable Level, And, As Applied To Churches And Other Charitable Organizations, Would Threaten Unwarranted Intrusion Into The Affairs Of Prevailing Plaintiffs

Petitioners' request that this Court engraft an "impecuniousness" requirement onto § 1988 would throw the federal courts into a mare's nest of litigation wholly collateral to the underlying questions of the initial lawsuits.

In the first instance, the courts would have to determine on their own what level of "impecuniousness" was required for a plaintiff to qualify for a fee award. Such line-drawing is quintessentially a legislative function best left to Congress. As we have seen, Congress did draw such lines in enacting the Equal Access to Justice Act; it determined not to do so with § 1988 precisely because no "impecuniousness" requirement was created for the latter statute.

Second, even if it were appropriate for the judiciary to legislate a definition of impecuniousness, application of that definition would be highly burdensome to the federal courts. Were the courts to embark upon wide-ranging inquisitions into the financial affairs of prevailing plaintiffs, they would be drawn into a thicket of endless fact-finding that would dwarf the determination of the amount of a reasonable counsel's fee. Indeed, the attorney's fee phase of the civil rights case would become the main event—an inquiry into the finances, income, expenditures, and spending habits of the prevailing party. It would demand the court's assessment of the reasonableness and

necessity of the party's purchases, and a scrutiny of the party's relationship with donors and vendors to determine whether its balance sheet reflects the true state of affairs, or is distorted by collusive transfers of money or assets. The courts would find themselves spending more time on ancillary attorney's fee proceedings than on deciding the merits.

Third, application of an "impecuniousness" requirement would pose serious questions of improper intrusion into the internal and financial affairs of those churches, charitable organizations, and political associations which may be civil rights plaintiffs. Not only would the courts be required to determine the financial status of such entities, but presumably losing defendants would be permitted to conduct discovery into such matters. At least with respect to churches, "it is not only the conclusions that may reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).[14]

It presumably was for these reasons that Congress, in establishing financial criteria for a plaintiff to recover a fee award under EAJA, specifically excluded organizations that are tax-exempt under § 501(c)(3) of the Internal Revenue Code from the limitation. *See* 5 U.S.C. § 504(b)(1)(B). Congress made the conscious decision to shield charitable and religious organizations from judicial inquiry into their finances, even when attorneys' fees are otherwise conditioned on the prevailing plaintiff's financial health.

This congressional policy is both practically and constitutionally sound, and it independently demonstrates why the imposition and definition of any "impecuniousness" require-

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[14] Indeed, *Catholic Bishop* is quite instructive. In that case, the court construed the National Labor Relations Act as not applying to the employment relationship between church-run schools and their lay employees, despite the absence of any specific language in the statute providing for such an exemption. The court so construed the statute precisely to avoid the serious constitutional question that would have been posed if the statute were deemed to apply. Here, petitioners seek to engraft, from whole cloth, a limitation upon § 1988 which, if accepted, would impose the same constitutional problems as those lurking in *Catholic Bishop*.

ment upon § 1988 should be left to Congress. To deal with the meddlesome inquiries that a financial means test entails would severely invade the operations of churches and charities, and detract from their missions. Of course, when directed toward to religious groups, such inquiries into internal affairs would offend the well-established principle of separation of church and state, as well. *E.g.*, *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Presbyterian Church*, 393 U.S. 440 (1969). Congress wisely sought to avoid these problems when it exempted § 501(c)(3) organizations from the net-worth ceiling test of the EAJA.

The financial means test proposed by the petitioners here also should be rejected. As discussed above, it would be an inappropriate usurpation of the legislative function for the Court to attach terms and conditions to § 1988 that Congress did not intend. Moreover, the course proposed by the City would thrust the courts into an area which Congress has an unmistakable and specific policy of avoiding. The courts should abide by that policy, which is consistent with well-settled constitutional principles, and decline the City's invitation to hold that § 1988 should be based on the prevailing party's finances or net worth.

### C. This Court Has Consistently Refused To Base Entitlement To Civil Rights Fee Awards On The Plaintiff's Ability To Pay For Counsel

It is well-settled that the identity of the private litigant or the litigant's attorney simply makes no difference when it comes to awarding attorneys' fees to civil rights plaintiffs. For example, the Court has held that a § 1988 fee award should be made according to the prevailing market rates, regardless of whether the plaintiff was represented by a private attorney or by the Legal Aid Society. *Blum* v. *Stenson*, 465 U.S. 886, 895 (1984). "[W]e draw no distinction between profit and nonprofit law offices." *Id.* at 901, n.18.

More recently, in *Blanchard* v. *Bergeron*, 489 U.S. 87 (1989), this Court unanimously held that a prevailing plaintiff's

arrangement to pay for legal services by a contingent-fee agreement should not be used to limit a court's estimate of the reasonable counsel fees that can be awarded under § 1988. Reversing a district court disposition that had reduced a $7,500 award under § 1988 to $4,000 based on the terms of the attorney's forty percent contingent-fee arrangement, the Court held that a private fee arrangement, standing alone, cannot impose an automatic limitation on the exercise of the judge's discretion to award a fee. If the contingent agreement provides less than what the court calculated to be the reasonable fee, "[t]he plaintiff should be required to pay the higher amount." 489 U.S. at 93.

> As we understood § 1988's provision for allowing a "reasonable attorney's fee," it contemplates reasonable compensation, in light of all the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less.

489 U.S. at 93.

Thus, the prevailing plaintiff's ability to provide for some or all of the legal services rendered should not disentitle the plaintiff to the full award of the attorneys' fees that the district court should find reasonable. In unambiguous language that applies with equal force to the present Petition, the Court explained:

> Thus it is that a plaintiff's recovery will not be reduced by what he must pay counsel. *Plaintiffs who can afford to hire their own lawyers, as well as impecunious litigants, may take advantage of this provision [§ 1988].* And where there are lawyers or organizations that will take a plaintiff's case without compensation, that fact does not bar the award of a reasonable fee. All of this is consistent with and reflects our decisions in cases involving court-awarded attorney's fees.

489 U.S. at 94 (emphasis added).

Thus, like Congress, the Court[15] has declared in the clearest language that fees under § 1988 are available to the solvent as well as the impecunious. As the Court put it succinctly, "we have not accepted the contention that fee awards in § 1988 damages cases should be modeled upon the contingent-fee arrangements used in personal injury cases." *Id.* at 96.

### D. Congress Enacted § 1988 To Make Fee Awards Broadly Available To All Prevailing Parties, Regardless Of Identity Or Wealth

It would be anomalous indeed now to construe § 1988 as benefitting only the destitute, cutting off all other litigants. Applying a financial means test to prevailing parties would violate the spirit of § 1988, which is to make it easier for litigants in *all* walks of life to file civil rights claims.

Congress enacted § 1988 to encourage the initiation of suits that vindicate public rights. It had "determined that 'the public as a whole has an interest in the vindication of the rights conferred the statutes enumerated in § 1988, over and above the civil rights remedy to a particular plaintiff.' " *Riverside* v. *Rivera*, 477 U.S. 561, 574 (1986) (*quoting Hensley*, 461 U.S. 424 at 444) (Brennan, J., concurring in part and dissenting in part)). Since Congress recognized that the public good that results from such cases goes far beyond the immediate material relief that the individual litigant may recover, it made the decision that attorneys' fee awards should be provided. "Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the action seeks monetary damages." *Blanchard*, 489 U.S. at 96.

The attorneys' fees provision was to serve two functions: to encourage private litigants to initiate suits against unconsti-

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[15] The *Blanchard* decision was written by Justice White and joined by seven other justices. Justice Scalia concurred in all respects but one—he took exception to the extent to which the Court relied for its analysis on *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (1978), and on other lower court decisions that had been cited in the legislative history of § 1988. It would seem that all nine justices in *Blanchard* unanimously agreed with the portions of the decision quoted here.

tutional conduct, and to serve as deterrent to government entities and officials engaging in such unlawful conduct. Congress declared that "fees are an integral part of the remedy necessary to achieve compliance with our statutory policies." S. Rep. No. 1011 at 3, 1976 U.S.C.C.A.N. at 5910; *see also id.* at 5, 1976 U.S.C.C.A.N. at 5913 ("fee awards are an integral part of the remedies necessary to obtain . . . compliance"). It was Congress' view that without the provision of attorneys fees awards in civil rights litigation, "the grant of Federal jurisdiction is but an empty gesture." *Id.* at 3, 1976 U.S.C.C.A.N. at 5910 (*quoting Hall* v. *Cole*, 412 U.S. 1 (1973)). The legislative history of § 1988 makes it plain that Congress intended the remedy to be ordinarily awarded to prevailing plaintiffs. The fee award is the rule, not the exception. The award of fees to the private civil rights plaintiff is indispensable to the ability to function fully "not for himself alone but also as a 'private attorney general' vindicating a policy that Congress considered on the highest priority." S. Rep. No. 1011 at 3, 1976 U.S.C.C.A.N. at 5910 (*quoting Newman* v. *Piggie Park Enterprises, Inc.*, 309 U.S. 400, 402 (1968)).

"Section 1988 makes no distinction between actions for damages and suits for equitable relief." *Blanchard*, 489 U.S. at 95. It is not the purpose of § 1988 to reward only those private plaintiffs who have reaped a financially munificent recovery. "The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief." *Id.* The quantum of relief, measured in pecuniary or material terms, is not determinative of entitlement to attorneys' fees. Congress designed § 1988 fully recognizing that constitutional relief normally cannot be measured in pecuniary terms. Frequently, even resounding victories bring no financial relief, or just token relief. In many cases in which § 1988 fees are available, the law "severely limit[s] the damage remedy." *Riverside*, 477 U.S. at 577.

> Because damage awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial

> monetary relief. . . . Thus, Congress recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money damages.

*Id.*, 477 U.S. at 576.

Just as it would be inappropriate to view § 1988 as a system of financial commissions tied to the purely economic value of a civil rights victory, it also would be entirely inconsistent with the statute's language or purpose to view it merely as need-based program of financial aid, distributing attorneys' fees to indigent litigants while leaving solvent litigants to shift for themselves. Congress designed § 1988 to close loopholes and "gaps" that had remained in the federal scheme of civil rights statutes; the goal was to make it more likely, rather than less likely, for an aggrieved plaintiff to bring a meritorious constitutional challenge. S. Rep. No. 1011 at 4, 1976 U.S.C.C.A.N. at 5910. The purpose of § 1988 was not limited to subsidizing the poor; it was to make the availability of relief and attorneys' fees as comprehensive as possible. Nothing in the legislative history suggests that attorneys' fee awards should be based on whether an attorney has been litigating on a pro bono basis. Instead, they were intended to be based on the open market: "In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all the time reasonably expended on a matter.' " S. Rep. No. 1011 at 6, 1976 U.S.C.C.A.N. at 5913.

Since Congress did not intend to limit the availability of § 1988 attorneys' fees to indigent or impecunious plaintiffs, the Court should reject the petitioners' suggestion to amend the statute by judicially grafting on a means test. Section 1988 attorneys' fees are available to all litigants—including churches of all ages, sizes, rites, and conditions of solvency.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: July 11, 1994

Respectfully submitted,

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JOHNSON & JOHNSON

# APPENDIX

**Opinion and Order of the United States District Court for the Middle District of Florida on Application for A Preliminary Injunction Enjoining Enforcement of Ordinance No. 3091-83**

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.

Plaintiff(s),

vs. CASE NO. 84-96-CIV-T-17

CITY OF CLEARWATER, et. al.,

Defendant(s).

and

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, et. al.,

Plaintiff(s),

CASE NO. 84-97-CIV-T-17

vs.

CITY OF CLEARWATER, FLORIDA, et. al.,

Defendant(s).

**MEMORANDUM OPINION AND ORDER**

This cause is before the Court on complaints seeking declaratory and injunctive relief challenging the enforcement of Clearwater Ordinance

Number 3091-83 (see Appendix 1), enacted by the Clearwater City Commission on October 6, 1983.

The City of Clearwater is a municipality of the State of Florida. Ordinance 3091-83 was passed on October 6, 1983, and did not go into force until January 31, 1984. On January 27, 1984, the parties entered into a stipulation by which they agreed the ordinance would not be enforced during the pendency of the instant litigation.

One should always be careful when attempting to summarize an ordinance or statute. In brief, the Clearwater ordinance seeks to regulate the solicitation practices of charitable organizations within Clearwater by requiring a registration statement be filed with the City Clerk by the

charitable organization seeking to solicit funds. The ordinance also requires the charitable organizations which solicit funds to maintain records and documents necessary to complete a registration statement and the City Attorney is given the authority to investigate charitable organizations which solicit funds if complaints are received from ten or more individuals.

On January 20, 1984, Americans United for Separation of Church and State; National Council of the Churches of Christ in the U.S.A.; The American Jewish Committee; Suncoast American Baptist Church; Joyce Parr, individually and as Moderator of the Suncoast American Baptist Church; and James A. Christison, individually, and as Treasurer of the Suncoast American Baptist Church, filed a

complaint seeking injuncitive (sic) relief against the City of Clearwater; Mayor of the City of Clearwater; City Manager of the City of Clearwater; City Clerk of the City of Clearwater; and City Attorney of the City of Clearwater (case 84-97-CIV-T-17).

On January 23, 1984, the Church of Scientology Flag Service Organization, Inc. filed a complaint seeking injunctive relief against the City of Clearwater; the City Attorney of the City of Clearwater; and the City Clerk of the City of Clearwater (Case 84-96-CIV-T17).

For the purpose of reviewing the facial validity of the city ordinance, these cases were joined, and on March 9, 1984, the Court heard oral arguments. At the end of their presentations, the Court instructed counsel that they were to

provide any post-hearing memorandum of law to the Court by March 16, 1984, as the Court intended to rule on the facial validity of the ordinance by the end of March 1984. On March 15, 1984, the Clearwater City Commission passed an amended ordinance which incorporated some of the arguments Plaintiffs' counsel presented to the Court on March 9, 1984.

Despite the fact that the City of Clearwater has amended their ordinance, the Court feels that it has jurisdiction to consider the facial validity of Ordinance Number 3091-83 as presented in the complaints and argued by counsel March 9, 1984. The reason is quite simple: to decide otherwise would encourage a municipality to enact laws which apparently affect the constitutional rights of its citizens and upon

those laws being legally challenged, to then amend them and effectively prolong the period of time during which citizens are unsure of their constitutional rights.

Another reason the Court feels that it should rule on this question is because of the large number of cases pending, and needing, the Court's time. This Court must let parties have their day in court but will not permit them to have someone else's day. In short, the Court does not intend for cases to go on forever. There reaches a point of decision in all cases, and for Ordinance Number 3091-83, that point of decision is here.

The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 and

§ 1343(a)(3) and the Doctrine of Pendent Jurisdiction. Venue is proper pursuant to 28 U.S.C. § 1391(b).

A cursory reading of Ordinance 3091-83 should indicate even to a layman that the ordinance impacts upon First Amendment freedoms. We read a great deal about the First Amendment and often one wonders if we fully consider the simplicity, yet majesty of the phrases our forefathers put together to establish the freedoms which make the United States the most unique country on earth.

The First Amendment of the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacebly to assemble, and to petition the government for a redress of grievances.

There are a few fundamental principles regarding the establishment and free exercise of religion clauses of the First Amendment:

All persons must be free to practice their faith without governmental intrusion or regulation. If government does seek to regulate, and the regulation impacts on religious practice, the governmental regulation must be in the furtherance of a compelling state interest and the government regulation must be the least restrictive means necessary to further that compelling state interest. Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

The government, in pursuing its legitimate, secular purposes, must avoid administrative entanglement with religious institutions. Walz v. Tax

Commission of the City of New York, 397 U.S. 664 (1970); Lemon v. Kurtzman, 403 U.S. 602 (1971).

The government must avoid associations favoring or opposing religion in general or specific religions in particular whether such discrimination is intentional or de facto. Abington School District v. Schempp, 374 U.S. 203 (1963) Larson v. Valente, 456 U.S. 228 (1982).

The government may not evaluate the benefits of religious practice including the truth or falsity of statements about the benefits of religious practices under any circumstances. United States v. Ballard, 322 U.S. 78 (1944); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969).

Laws enacted to regulate public solicitations by religious, political, and social organizations often impact on the religious guarantees of the First Amendment together with the freedom of speech and association protections in that amendment. Several principles have been developed to judge such laws.

Public solicitation is a protected activity under the First Amendment because, as a practical matter, fund raising is necessary for a church or association to survive and because it is an effective method of reaching the audience or membership to "get the word out". Cantwell v. Connecticut, 310 U.S. 296 (1940); Fernandes v. Limmer, 663 F.2d 619 (5 Cir. 1981).

There are areas in which the state may have an important interest in regulating solicitation activities of the public. The state or municipality has a legitimate interest in seeking to avoid disturbances of the peace and insuring public safety, and therefore, certain time, place, and method restraints can be placed on solicitation activities. Courts have also recognized that a state or municipality has an interest in prohibiting "fraud" in solicitations. In this regard, a municipality may regulate to insure that funds raised actually find their way to the organization for which the solicitation was given. Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

The regulatory authority (ie. government) may not attempt to regulate the content of the representations made to induce contributions on the basis that the representations falsely state spiritual, emotional, or other benefits which may accrue to the contributor in this world or the next. **United States v. Ballard,** 322 U.S. 78 (1944).

As is the case with most statutes which impact upon First Amendment freedoms, any regulation of public solicitation must be by the least restrictive means necessary to further the compelling state interests. **Fernandes v. Limmer,** 663 F.2d 619 (5 Cir. 1981). No discretion must be left to the administrative and enforcement officials as to the scope or breath [sic] of the regulation **Hynes v. Mayor and Council of**

the Borough or Oradell, 425 U.S. 610 (1976); Village of Schaumberg (sic) v. Citizens for a Better Environment, 444 U.S. 620 (1980).

Regulations concerning solicitations must be limited to those solicitations of the public in public places. International Society of Kirshna (sic) Consciousness of Houston, Inc. v. City of Houston, Texas, 689 F.2d 541 (5 Cir. 1982). Regulation of solicitations on the premises of a church or political association is not necessary because that activity could not disturb the public; there is not a danger of misrepresentation in this solicitations, by the organization for which contributins were sought. See City of Houston supra, at 562.

Any regulation of public solicitations must not effect a prior restraint upon such activities. Prompt and adequate judicial review procedures including appeal must be available to insure that decisions made by administrators do not effectively forestall First Amendment activities which should be allowed. **Fernandes v. Limmer**, supra at 628.

The state may not pass laws which aid one religion or which prefer one religion over another. This principle of neutrality among religions requires the court to examine this ordinance on its face to determine whether it will have a discriminatory or unequal effect upon different religious groups or practices by exempting some churches or religious organizations, and, subjecting others to

regulations or burdens. **Epperson v. Arkansas**, 393 U.S. 97 (1968); and **Larson v. Valente**, 456 U.S. 228 (1982).

If the Court finds such a result, i.e., discrimination, the legislation must be struck down unless the discriminatory features are necessary to further a compelling state interest and unless there exists no less restrictive means to accomplish the state interest without imposing disparate burdens upon religious groups **Larson v. Valente**, supra, at 244-255.

In **Larson** the Supreme Court found that an ordinance which created a disparate impact upon smaller religious groups and exempted more established churches, could not be justified by a compelling interest. The court went on to find that the ordinance imposed

registration and reporting requirements on some religious organizations, but not on others; this non-evenhanded operation created an indication of official denominational preference.

Clearwater Ordinance 3091-83 exempts those churches which limit their solicitations to those who regularly attend or participate in religious services (Section 100.01(5)). Churches which obtain contributions from members who participate in church services on a non-regular or episodic basis, as well as churches which do not offer, encourage, or require regular attendance or regular participation of their members are <u>not</u> exempt. Thus, a stable church membership requiring regular attendance need not be affected by this ordinance; however, a church whose membership is growing and

actively engaged in proselytizing and fund raising falls under the regulatory scheme of this ordinance.

How can a church whose congregation or group of members is growing, ever, at any given time, indicate to civil authority the number of "members" it has in regular attendance or as participants in the organization?

If a drunk were to stagger into a church and "be saved" and then indicate an intention to dedicate his life to its purposes through regular attendance at that church, would he be a "member"?

There is absolutely no showing of any compelling state interest being furthered by the parameters of the limited membership exemption of this ordinance. This ordinance not only impies a religious preference, its mere

presence could foster a stagnation of religious practice in Clearwater by impacting on growing congregations and forestalling larger, more organized churches from continuing to seek new members as well.

The Defendant has indicated, during oral argument, that the Clearwater ordinance was modeled after a recent ordinance in the City of Houston and therefore this ordinance should be upheld upon the authority of International Society for Krishna Consciusness of Ouston, Inc. v. City of Houston, Texas, 689 F.2d 541 (5 Cir. 1982). The Court finds there is no safe harbor for Clearwater in the City of Houston as the Houston ordinance did not license the discriminatory power in administrative officials plus the investigatory and

enforcing powers which the Clearwater ordinance encompasses. In fact, the Houston ordinance did not grant the power to officials charged with enforcing the solicitation ordinance to conduct investigations, compel disclosure, and prosecute organizations who must register. The Firth Circuit recognized and emphasized Houston's amendment of their ordinance was critical in that Court's decision upholding the ordinance, as the amended ordinance eliminated language allowing enforcing officials in Houston to "make such investigation as he may deem necessary to ascertain the truth of the facts and information set out" in the registration statement.

In Clearwater's ordinance, the City Attorney is granted broad investigatory powers to investigate violations of the

prohibited acts section of the ordinance (see Section 100.06, 100.05(a)(b), 100.05(1)(a), 100.05(1)(c), 100.05(1)(g). The Clearwater ordinance does precisely what the Fifth Circuit emphasized the Houston ordinance did not.

The enforcement provisions of the ordinance do not contain articulated standards indicating when the City Attorney should or will investigate an organization against which ten complaints have been filed. This vagueness in determining when the City Attorney will conduct an investigation when ten complaints have been filed against an organization creates an opportunity for arbitrary and subjective enforcement of a law infringing on constitutional rights and accordingly, it is unconstitutional. Grayned v. City of Rockford, 408 U.S. 104

(1972); **Baggett v. Bullitt**, 377 U.S. 360 (1964); **Kolender v. Lawson**, ___ U.S. ___, 75 L.Ed.2d 903 (1983) (involving a criminal statute).

At oral argument counsel for Americans United described the ordinance as one in which "a shot gun was used to shoot a mouse". This Court would not state that analogy as a test for constitutionality; however, the Court is compelled, upon review of Clearwater Ordinance 3091-83 to declare the ordinance unconstitutional as it will impact upon smaller churches with growing or changing congregations, requiring smaller churches to be subjected to regulation while exempting more established congregations, thereby violating the principle of neutrality without a compelling state interset.

Further, the Court finds that the instant ordinance is quite different than that addressed by the Fifth Circuit in the City of Houston.

Accordingly, the Court declares Clearwater City Ordinance Number 3091-83 unconstitutional and permanently enjoins its application or enforcement.

Case 84-97 is hereby dismissed and Case 84-96 is hereby dismissed as to Counts Two through Twelve of the complaint; the Clerk is directed to enter judgments for the respective Plaintiffs against Defendants. Jurisdiction is retained for the enforcement of the executory provisions herein.

**DONE AND ORDERED** in Chambers, in Tampa, Florida, this 28th day of March, 1984.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies furnished to:
All Counsel of Record

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 93-1603

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

CITY OF CLEARWATER, FLORIDA, *et al.*,
*Petitioners,*
v.
CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## REPLY BRIEF OF PETITIONERS

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## REPLY BRIEF OF PETITIONERS

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1. In its opposition, Scientology claims it was a prevailing party because it caused changes in the ordinance. But as explained in Clearwater's petition, the changes Scientology caused either did not aid it or were adverse to it. This, indeed, was the finding of the District Court, which was intimately familiar with the case.

2. In its opposition, Scientology says that the very wealthiest companies should receive attorneys fees under Section 1988, and that even litigation misconduct does not warrant denial of fees. We believe Congress would be very surprised to learn that its intent in enacting Section 1988 was to award fees to the wealthy, thereby "raising" them to the economic level of the poor for whom the statute was enacted, and that it intended to reward misconduct by nonetheless allowing fees.

3. In its opposition Scientology says that denial of fees to the wealthy will create a "mare's nest of [col-

lateral] litigation." Opp. p. 23. But there will be no mare's nest when it comes to organizations such as Scientology and the corporate plaintiffs discussed in the petition, since they so clearly are wealthy organizations which regularly finance and can afford litigation.[1] Nor will there be a mare's nest with regard to the less affluent for whom Section 1988 was enacted, since they so clearly *cannot* afford expensive civil rights litigation.

In cases where it may in fact be necessary to determine ability to finance expensive litigation, the question will be no different than exists under other statutes, including ones cited by Scientology.

Respectfully submitted,

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[1] Indeed, the amount of collateral litigation will be reduced regarding them, because it will not be necessary to engage in the extensive litigation which currently exists over the *amount* of fee